(25,939)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 184.

JAMES E. WHITEHEAD, PLAINTIFF IN ERROR,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELERS INSURANCE COMPANY, AND THE ATKINSON, WARREN & HENLEY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1918.

a *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of the State of Oklahoma, at Oklahoma City in the State of Oklahoma, on this 2nd day of April, 1917.

[Seal Supreme Court, State of Oklahoma.]

W. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma,
By N. C. ORR, *Ass't.*

Costs of Suit.

Plaintiff in Error's costs, $29.00 paid by J. E. Whitehead.
Defendant in Error's costs, $——.
Costs of transcript, $—— paid by J. E. Whitehead.

W. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma,
By N. C. ORR, *Ass't.*

1 In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number Five.

No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELERS Insurance Company and The Atkinson, Warren & Henley Company, a Co-partnership, Defendants in Error.

Filed Jul- 27, 1915. William M. Franklin, Clerk.

Syllabus.

1. Prior to the 21st day of June, 1906, the Southern judicial district of the United States Court for the Indian Territory was an

organized judicial district with a judge, clerk, and other court officers and had been divided into recording districts.

On that day the President approved an act of Congress creating a new recording district to be known as the 29th recording district with Duncan as the place fixed for holding court and maintaining the clerk and ex-officio recorder's office.

Held: That the creating act of congress ipso facto established the recording district and that no subsequent organization was necessary and that after that date a deed to land in that district, even before the clerk and ex-officion recorder's office had been opened in the district for the transaction of business, should properly have been filed in the recorder's office at Duncan in the newly established district and not in the office of the old district in which the land thereby conveyed had formerly been located.

2. A new recording district known as the 29th recording district was, on the 21st day of June, 1906, by an act of Congress approved on that day, created in the established and organized southern judicial district of the United States Court for the Indian Territory out of territory formerly comprised within what was known as 20th recording district. A deputy clerk and ex-officio recorder was not appointed and qualified until the 30th of June of that year and did not open his office for the transaction of business until the 7th of the following July. On the 27th of June, 1906, W. procured a deed to land then located in the newly created 29th district but formerly located in the old 20th district and on the 28th day of June filed the same for record in the office of the ex-officio recorder at Ryan in the old 20th recording district.

Held: That such registration did not convey constructive notice of W.'s deed to subsequent purchasers of the land, for value and without notice.

It is a well established rule that where a new county is created from lands originally comprised within the limits of an old county and subsequent to the formation of the new county a deed is executed to land therein which was formerly within the old county the recording of such deed in the recording office of the old county is not effective as against a subsequent purchaser in good faith, without notice of the former deed.

2 *Commissioners' Opinion, Division No. 5.*

Error from District Court, Carter County; Hon. S. H. Russell, Judge.

Action by James E. Whitehead against James O. Galloway and others. Judgment for the defendants and the plaintiff brings error. Affirmed.

James E. Whitehead, of McAlester, per se. H. A. Ledbetter, of Ardmore, for defendants in error.

Opinion by

WILSON, *C.:*

Plaintiff in error commenced his action in the lower court against the defendants in error to recover possession of certain land in Carter

county, Oklahoma, alleging, substantially, in his petition that on June 27th, 1906, by deed of that date, he derived his title from one, Wilburn Adams, a Choctaw Indian whose restrictions on the alienation of said land had been removed; that his deed thereto had been duly and legally recorded and that since said date he has been the owner of and entitled to the possession of said land; that thereafter his grantor, Wilburn Adams, deeded said land to the defendant in error, James O. Galloway; that Galloway and wife thereafter deeded the land to defendant in error, Winfield S. Pressgrove, who later mortgaged it to the Travelers Insurance Company by executing two mortgages thereon and that one of said mortgages was afterwards assigned to The Atkinson-Warren & Henley Company.

The defendants in error urged as their defense that they were purchasers of said land in good faith, for value, without notice of plaintiff's deed; that plaintiff was never in possession of said land and that the deed on which plaintiff relies was not recorded in the 29th recording district of the southern judicial district of the Indian Territory in which said land was situated at the time he acquired his title thereto.

The plaintiff, however, contended that his deed was on record in the 20th recording district of said judicial district and that at
3 the time he purchased said land and placed his deed on record the land was located in the 20th recording district.

The case went to trial in the lower court on an agreed statement of facts which was, in substance, as follows:

"That the land in controversy was allotted to Wilburn Adams on the 5th day of April, 1904, as a part of his surplus allotment and that patents were issued and recorded in compliance with law; that on December 8th, 1905, the restrictions on the alienation thereof were removed by the Secretary of the Interior; that on June 27th, 1906, Wilburn Adams made and delivered to the plaintiff his warranty deed to said lands and that said deed was filed for record in the office of the 20th recording district at Ryan, Indian Territory, on the 28th day of June, 1906.

That on November 16th, 1906, James O. Galloway procured a deed to said land from said Wilburn Adams and his wife and recorded the same on the 22nd day of November, 1906, in the office of the 29th recording district at Duncan, Indian Territory; That on December 24th, 1906, said Galloway and his wife deeded said land to Winfield S. Pressgrove and his wife who recorded the deed in the office of the 29th recording district; that afterwards said Pressgrove and his wife gave two mortgages on said land to the Travelers Insurance Company which later assigned one of the mortgages to the defendant in error, The Atkinson, Warren & Henley Company and that said mortgages and assignment were recorded in the 29th recording district.

That on June 21st, 1906, the President of the United States approved an act of congress which was as follows:

"That in addition to the places now provided by law for holding courts in the southern judicial district of Indian Territory court shall be held in the town of Duncan, and all laws regulating the holding of the court of the Indian Territory shall be applicable to said court hereby created in said town of Duncan. That the territory next here-

inafter described shall be known as recording district number twenty-nine (then describes territory within which the land in controversy is located) and the place of recording and holding court in said district shall be Duncan."

That prior to the passage of the above mentioned act of congress the lands involved in this action were situated in the 20th recording district of the Indian Territory, commonly known as the "Ryan District", and that said lands were included in the above mentioned act of congress and constituted a part of the 29th recording district.

That on the 30th day of June, 1906, C. M. Campbell, who was then clerk of the United States Court for the southern judicial district of the Indian Territory, appointed and designated C. N. Jackson as deputy clerk, whose appointment was on the same day approved by the judge of said court; that on the same day he took the oath of office and filed his official bond as deputy clerk of the court; that said C. N. Jackson's appointment was the first and only appointment ever made as deputy clerk and ex-officio recorder for the 29th recording district; that said Jackson arrived at Duncan and opened his office on the 7th day of July, 1906, and that prior to said 7th day of July, 1906, no office had been maintained in the 29th recording district of the Indian Territory.

That from the time said Winfield S. Pressgrove took the conveyance to said land on December 24th, 1906, he has been in actual possession of the same.

4 That if plaintiff recovers he shall be entitled to sixty dollars a year for five years, or three hundred dollars, as rents for the years plaintiff has been withheld from the possession of the land, as against the defendant, Winfield S. Pressgrove."

Upon the trial of the case the court below rendered judgment for the defendants and against the plaintiff, from which judgment and from the order of the court overruling his motion for a new trial plaintiff appeals the case to this court.

The question for this court to determine is: What was the legal effect of the filing for record in the office of the deputy clerk of the court in the 20th recording district of plaintiff's deed to the land in controversy after the 29th recording district had been established by act of congress, the land conveyed being located in the new district, before the deputy who was to have charge of the office in that district had been appointed and the office in the new district actually opened for business?

If the plaintiff's deed was properly filed in the 20th (Ryan) district the plaintiff should have recovered but if it should have been filed in the newly created 29th (Duncan) district the judgment of the lower court was right and should be affirmed.

Plaintiff in error argues very ably in his brief that the facts of this case are analogous to those of a case where land theretofore embraced within another county had been conveyed after an act had been passed transferring it into a newly established county but before the new county had been actually organized, and that, although the act creating the 29th recording district had been passed by congress and approved by the president, his deed was properly filed in the recording office at Ryan in the 20th district and constructive notice of his title to the land in controversy thereby given to the defendants

for the reason that the 29th recording district had not been organized at the time the deed was filed in the office at Ryan, by the appointment and qualification of a deputy clerk of the United States Court for the southern district of the Indian Territory for such recording district and an office opened for business therein in which such deed could have been filed at the time it was in fact filed in the Ryan office in the 20th district.

The case sustaining plaintiff in error's contention which is most nearly in point is that of Lumpkin vs. Muncey, a Texas case reported in the 17th S. W., 732. The Texas case above referred to is not in point, however, for the reason that the establishment of the 29th recording district in the southern judicial district of the Indian Territory was not the establishment of such a governmental sub-division as a county which could not exist in fact until its governmental machinery had been created and set in operation by some other method than the creative act of the legislature which designated the territory to be contained therein and authorized its organization.

At the time the congressional act creating the 29th recording district (34th Stat. at Large, 342) was approved by the President the southern judicial district of the United States Court for the Indian Territory had been created and organized and had a judge, clerk and other officers of the court and had been sub-divided into recording districts of which the clerk of the court was ex-officio the recording officer.

At the time the new 29th district was established by congress the federal laws provided that:

"They (clerks) shall be ex-officio recorders within their respective divisions, and as such they shall perform such duties as are required of recorders of deeds under the said laws of Arkansas, * * *". Fed. Stat. Anno., Vol. 3, 414; 26 Stat. at L., 98.

The very instant the 29th recording district was created by the act of congress it was, by operation of law, supplied with an officer, the clerk of the court of the southern judicial — of the United States Court for the Indian Territory, and the act creating it designated the place at which his duties as recorded should be performed, to wit, at Duncan. The only thing that thereafter remained to be done was the ministerial act of supplying the clerk of the court, or his deputy, if he chose to assign one to that district, with quarters in Duncan in which to conduct the business of his office and the few necessary record books. Had the clerk of the court been at Duncan with the necessary record books at the time the act of congress creating the district was approved no act, ministerial or otherwise, would have remained to be done to effect the organization of the 29th recording district.

Of course, the fact that the clerk of the court was delayed in providing the district with an active deputy and with the necessary records and quarters was an inconvenience to the plaintiff in error but that fact could not justify him in concluding that the district had not been organized and that the land included in his deed and in controversy in this action continued to remain a part of the 20th recording district.

By the act of congress of February 19th, 1903, Chapter 27 of Mansfield's Digest of the Statutes of Arkansas was extended in force

in the Indian Territory in so far as the same was applicable and not inconsistent with the laws of congress. Fed. Stat. Anno., Vol. 10, 130, 32 Stat. at L., 841. Section 671 of Mansfield's Digest, in force in the Indian Territory at the time, provided that no deed should be valid as against a subsequent purchaser of the land thereby conveyed unless the same was recorded in the county where the land was situated, unless the subsequent purchaser had notice of such deed.

Certain acts of congress created "recording districts" in the Indian Territory, for recording purposes, in lieu of counties and the particular act of congress approved June 21st, 1906, creating the 29th district was set out in the agreed statement of facts in this case in the court below and is, in part, quoted above.

It is a well settled rule that where a new county is created in whole or in part of lands originally comprised within the limits of an old county and subsequent to the formation of a new county a deed is executed to lands therein which were formerly within the old county the recording of such deed in the old county is not effective
7 as against a subsequent purchaser, in good faith, without notice of the former deed. Astor vs. Wells, 4 Wheaton, 466, 4 Law Ed., 616. Green vs. Green, 103 Cal., 108, 37 Pac., 188. Garrison vs. Hayden, 19 Am. Dec., 70. We ther-fore conclude that the act of congress approved June 21st, 1906, ipso facto created and established the 29th recording district of the southern judicial district of the United States Court for the Indian Territory; that instruments conveying the title to land within the boundaries of that district executed after that date should have been filed in the office of the recorder at Duncan and that the act of the plaintiff in error in filing his deed to the land in controversy in the office of the recorder at Ryan in the 20th recording district was not such an act as conveyed to or charged the defendants in error with notice of plaintiff in error's deed to the land in controversy.

Finding no error in the case we therefore recommend that the judgment appealed from be affirmed.

Jul- 27, 1915.

By the Court: Adopted in whole.

Filed July 27th, 1915. William Franklin, Clerk.

8 In the Supreme Court of the State of Oklahoma.

Supreme Court Commission, Division Number Five.

No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELERS Insurance Company and The Atkinson, Warren & Henley Company, a Co-partnership, Defendants in Error.

(On Re-Hearing.)

Syllabus.

1. Prior to the 21st day of June, 1906, the southern judicial district of the United States Court for the Indian Territory was an organized judicial district with a judge, clerk and other court officers and had been divided into recording districts.

On that day the President approved an act of congress creating a new recording district to be known as the 29th recording district with Duncan as the place fixed for holding court and maintaining the clerk and ex-officio recorder's office.

Held: That the creating act of congress ipso facto established the recording district and that no subsequent organization was necessary and that after that date a deed to land in that district, even before the clerk and ex-officio recorder's office had been opened in the district for the transaction of business, should properly have been filed in the recorder's office at Duncan in the newly established district and not in the office of the old district in which the land thereby conveyed had formerly been located.

2. A new recording district known as the 29th recording district was, on the 21st day of June, 1906, by an act of congress approved on that day, created in the established and organized southern judicial district of the United States Court for the Indian Territory out of territory formerly comprised within what was known as 20th recording district. A deputy clerk and ex-officio recorder was not appointed and qualified until the 30th of June of that year and did not open his office for the transaction of business until the 7th of the following July. On the 27th of June, 1906, W. procured a deed to land then located in the newly created 29th district but formerly located in the old 20th district and on the 28th day of June filed the same for record in the office of the ex-officio recorder at Ryan in the old 20th recording district.

Held: That such registration did not convey constructive notice of W's deed to subsequent purchasers of the land, for value and without notice.

Commissioners' Opinion, Division No. 5.

Error from District Court, Carter County, Hon. S. H. Russell, Judge.

9 Action by James E. Whitehead against James O. Galloway and others. Judgment for the defendants and the plaintiff brings error.

Affirmed.

James E. Whitehead, of McAlester, per se. H. A. Ledbetter, of Ardmore, for defendant in error.

Opinion by

WILSON, C.:

Plaintiff in error commenced his action in the lower court against the defendants in error to recover possession of certain land in Carter County, Oklahoma, alleging, substantially, in his petition that on June 27th, 1906, by deed of that date, he derived his title from one Wilburn Adams, a Choctaw Indian whose restrictions on the alienation of said land had been removed; that his deed thereto had been duly and legally recorded and that since said date he has been the owner of and entitled to the possession of said land; that thereafter his grantor, Wilburn Adams, deeded said land to the defendant in error, James O. Galloway; that Galloway and wife thereafter deeded the land to defendant in error, Winfield S. Pressgrove, who later mortgaged it to the Travelers Insurance Company by executing two mortgages thereon and that one of said mortgages was afterwards assigned to the Atkinson-Warren & Henley Company.

The defendants in error urged as their defense that they were purchasers of said land in good faith, for value, without notice of plaintiff's deed; that plaintiff was never in possession of said land and that the deed on which plaintiff relies was not recorded in the 29th recording district of the southern judicial district of the Indian Territory in which said land was situated at the time he acquired his title thereto.

The plaintiff, however, contended that his deed was on record in the 20th recording district of said judicial district and that at the time he purchased said land and placed his deed on record the land was located in the 20th recording district.

The case went to trial in the lower court on an agreed
10 statement of facts which was, in substance, as follows:

"That the land in controversy was allotted to Wilburn Adams on the 5th day of April, 1904, as a part of his surplus allotment and that patents were issued and recorded in compliance with law; that on December 8th, 1905, the restrictione on the alienation thereof were removed by the Secretary of the Interior; that on June 27th, 1906, Wilburn Adams made and delivered to the plaintiff his warranty deed to said lands and that said deed was filed for record

in the office of the 20th recording district at Ryan, Indian Territory, on the 28th day of June, 1906.

That on November 16th, 1906, James O. Galloway procured a deed to said land from said Wilburn Adams and his wife and recorded the same on the 22nd day of November, 1906, in the office of the 29th recording district at Duncan, Indian Territory; That on December 24th, 1906, said Galloway and his wife deeded said land to Winfield S. Pressgrove and his wife who recorded the deed in the office of the 29th recording district; that afterwards said Pressgrove and his wife gave two mortgages on said land to the Travelers Insurance Company which later assigned one of the mortgages to the defendant in error, The Atkinson, Warren & Henley Company, and that said mortgages and assignment were recorded in the 29th recording district.

That on June 21st, 1906, the President of the United States approved an act of congress which was as follows:

"That in addition to the places now provided by law for holding courts in the southern judicial district of Indian Territory court shall be held in the town of Duncan, and all laws regulating the holding of the court of the Indian Territory shall be applicable to said court hereby created in said town of Duncan. That the territory next hereinafter described shall be known as recording district number twenty-nine.

(Then described territory within which the land in controversy is located)

and the place of recording and holding court in said district shall be Duncan.'

That prior to the passage of the above mentioned act of congress the lands involved in this action were situated in the 20th recording district of the Indian Territory, commonly known as the 'Ryan District' and that said lands were included in the above mentioned act of congress and constituted a part of the 29th recording district.

That on the 30th day of June, 1906, C. M. Campbell, who was then clerk of the United States Court for the southern judicial district of the Indian Territory, appointed and designated C. N. Jackson as deputy clerk, whose appointment was on the same day approved by the judge of said court; that on the same day he took the oath of office and filed his official bond as deputy clerk of the court; that said C. N. Jackson's appointment was the first and only appointment ever made as deputy clerk and ex-officio recorder for the 29th recording district; that said Jackson arrived at Duncan and opened his office on the 7th day of July, 1906, and that prior to said 7th day of July, 1906, no office had been maintained in the 29th recording district of the Indian Territory.

That from the time said Winfield S. Pressgrove took the conveyance to said land on December 24th, 1906, he has been in actual possession of the same.

That if plaintiff recovers he shall be entitled to sixty dollars a

year for five years, or three hundred dollars, as rents for the
11 years plaintiff has been with-held from the possession of the land, as against the defendant, Winfield S. Pressgrove."

Upon the trial of the case the court below rendered judgment for the defendants and against the plaintiff, from which judgment and from the order of the court overruling his motion for a new trial plaintiff appeals the case to this court.

The judgment in this case was once affirmed in an opinion by the writer hereof but again comes up for consideration on plaintiff in error's motion for a rehearing. While we are satisfied that our conclusions reached in the former opinion were correct, yet the brief in support of the motion for a rehearing convinces us that our reasoning was, in part, faulty, and we therefore withdraw that opinion and submit this one in lieu thereof.

The question for this court to determine is: What was the legal effect of the filing for record in the office of the ex-officio recorder in the 20th recording district of plaintiff's deed to the land in controversy after the 29th recording district had been established by act of congress but before the deputy who was to have charge of the office in that district had been appointed and the office in the new district actually opened for business, the land conveyed being located in the new district?

If the plaintiff's deed was properly filed in the 20th (Ryan) district the plaintiff should have recovered but if it should have been filed in the newly created 29th (Duncan) District the judgment of the lower court was right and should be affirmed.

Plaintiff in error argues very ably in his brief that the facts of this case are analogous to those of a case where land theretofore embraced within a certain county had been conveyed after an act had been passed transferring it into a newly established county but before the new county had been actually organized, and that, although the act creating the 29th recording district had been passed by congress and approved by the president, his deed was properly filed in the recording office at Ryan in the 20th district and constructive
12 notice of his title to the land in controversy thereby given to the defendants for the reason that the 29th recording district had not been organized at the time the deed was filed in the office at Ryan, by the appointment and qualification of an ex-officio recorder for such recording district and an office opened for business therein in which such deed could have been filed at the time it was in fact filed in the Ryan office in the 20th district.

The case sustaining plaintiff in error's contention which is most nearly in point is that of Lumpkin vs. Muncey, a Texas case reported to the 17th S. W., 732. The Texas case above referred to is not in point, however, for the reason that the establishment of the 29th recording district in the southern judicial district of the Indian Territory was not the establishment of such a governmental subdivision as a county which could not exist in fact until its governmental machinery had been created and set in operation by some other method than the creative act of the legislature which designated the territory to be contained therein and authorized its organization.

It is a well settled rule that where a new county is created in whole or in part of lands originally comprised within the limits of an old county and subsequent to the formation of a new county a deed is executed to lands therein which were formerly within the old county the recording of such deed in the old county is not effective as against a subsequent purchaser, in good faith, without notice of the former deed. Astor vs. Wells, 4 Wheaton, 466, 4 Law Ed. 616, Green vs. Green, 103 Cal., 108, 37 Pac., 188, Garrison vs. Hayden, 19 Am. Dec., 70.

It is likewise true, as contended by plaintiff, that acts of the Legislature which create new counties do no more than to provide for their organization and until the new county is actually organized the territory to be incorporated therein remains subject to the jurisdiction of the old county from which it was carved.

13 O'Shea v. Twohig, 9 Tex., 170.

Plaintiff, however, fails to observe the distinction between a county and a recording district as such districts existed in the Indian Territory prior to Statehood.

A county is a political subdivision of the State, established for the more convenient administration of the government thereof and is invested with such powers as are necessary to be exercised for the welfare, advantage and protection of the public within its boundaries.

7th R. C. L. Title, Counties, Sec. 2.

A county is a governmental subdivision, a quasi corporation, an intangible entity having powers. A mere statutory authorization for the organization of a county does not create a county. A county cannot exist without having first been organized. Until it has been organized it has not attained the dignity of even a quasi public corporation. It isn't an intangible entity. It isn't a county, and that is the reason why territory authorized by legislative enactment to be carved from an existing county and a new county created therefrom remains under the jurisdiction of the mother county until its quasi-municipal organization has been, in fact, effected and that is the reason why a deed to land within such a proposed new county, executed after the legislature has authorized its creation but before its organization as a quasi municipal subdivision of the State, must, if filed for record before the county organization is effected, be filed in the old county.

Such was not the case, however, with a recording district in the Indian Territory. A recording district was not a governmental or political subdivision. It was not a quasi-public corporation. It was not a political or governmental entity of any character. It had no "powers" as a county has, and no organization was necessary for the purpose for which it was established by congress. It

14 was simply a territorial area, the boundaries of which were established by Congress and within which certain things should or must be done, and one of the things which should have been done therein was the recording of a deed to lands located within

its territorial boundaries which had been executed after such a recording district had been established by act of Congress. It was very similar to a District Court Judicial District in the State of Oklahoma. Such a Judicial District doesn't have to be organized. It isn't a political subdivision and has no powers. The court which sits within it has to be organized, but the district, itself, doesn't, for it isn't a political entity of any character.

At the time the congressional act creating the 29th recording district (34th Stat. at Large, 342) was approved by the president the southern judicial district of the United States Court for the Indian Territory had been created and had a judge, clerk and other officers of the court and had been sub-divided into recording districts, and the act referred to created the new recording district and designated Duncan as the town therein at which the sessions of the federal court should be held in that district and at which the recorder should maintain his office.

The very instant the 29th recording district was created by act of congress it was, by operation of law, supplied with an officer, the clerk of the court of the southern judicial district of the United States Court for the Indian Territory, and the act creating it designated the place at which the duties of the recorder should be performed, to-wit: at Duncan, and deeds to land therein situated which were executed after its creation should have been recorded at Duncan because the federal statutes prescribing where such deeds should be recorded expressly said so.

Certain acts of congress created "recording districts" in the Indian Territory, for recording purposes, in lieu of counties and the particular act of congress approved June 21st, 1906, creating
15 the 29th district was set out in the agreed statement of facts in this case in the court below and is, in part, quoted above.

By the act of congress of February 19th, 1903, Chapter 27 of Mansfield's Digest of the Statutes of Arkansas was extended in force in the Indian Territory in so far as the same was applicable and not inconsistent with the laws of congress. Fed. Stat. Anno., Vol. 10, 130, 32 Stat. at L., 841. Section 671 of Mansfield's Digest, in force in the Indian Territory at the time, provided that no deed should be valid as against a subsequent purchaser of the land thereby conveyed unless the same was recorded in the county where the land was situated, unless the subsequent purchaser had notice of such deed.

The act of congress approved June 21, 1906, defined the boundaries of recording district No. 29 and no further organization thereof was *un*necessary. The statutes in force in the Indian Territory at that time expressly provided that deeds should be recorded in the district in which the land thereby conveyed was situated at the place of holding court (32 Stat. at Large 841) and as at the time the plaintiff's deed to the land in controversy was executed and delivered the land was located in the Duncan District which had been established by the act of congress approved June 21, 1906, said deed should properly have been recorded at the Duncan office, in the 29th recording district and its being recorded in the Ryan

office in the 20th recording district was not a compliance with the statute then in force governing the recording of such instruments. Of course, the fact that the clerk of the court was delayed in providing the district with a resident deputy and ex-officio recorder, and with the necessary records and quarters was an inconvenience to the plaintiff in error but that fact could not justify him in concluding that the district had not been organized and that the land included in his deed and in controversy in this action con-
16 tinued to remain a part of the 20th recording district.

We conclude that the act of congress approved June 21st, 1906, ipso facto created and established the 29th recording district of the southern judicial district of the United States Court for the Indian Territory; that instruments conveying the title to land within the boundaries of that district executed after that date should have been filed in the office of the recorder at Duncan and that the act of the plaintiff in error in filing his deed to the land in controversy in the office of the recorder at Ryan in the 20th recording district was not such an act as conveyed to or charged the defendants in error with notice of plaintiff in error's deed to the land in controversy.

Finding no error in the case we therefore recommend that the judgment appealed from be affirmed, and that the opinion heretofore filed in this case be withdrawn and this opinion substituted therefor.

Endorsed: Dec. 21, 1915, By the Court: Adopted in Whole. Filed Dec. 21, 1915. William M. Franklin, Clerk.

17 In the Supreme Court of the State of Oklahoma.

Case No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELLERS Insurance Company, and the Atkinson, Warren & Henley Company, a Co-partnership, Defendants in Error.

Petition for Writ of Error.

Your petitioner, James E. Whitehead, hereby states and sets forth: That on or about December 21st, 1915, the Supreme Court in and for the State of Oklahoma made and entered a final order and judgment herein in favor of defendants in error, James O. Galloway, Winfield S. Pressgrove, The Travellers Insurance Company, and the Atkinson, Warren & Henley Company, a co-partnership, and against said James E. Whitehead, appellant, in which final order and judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of the said James E. Whitehead,

all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the Supreme Court in and for the State of Oklahoma is the highest court of the said State of Oklahoma, in which a decision in this suit and in this matter could be had.

Wherefore, the said James E. Whitehead, petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Oklahoma, for the correction of errors so complained of, and, that a transcript of the record and all proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States; and petitioner prays that the judgment of the Supreme
18 Court of the State of Oklahoma aforesaid be reversed and remanded.

Dated this 31st day of March, A. D., 1917.

C. S. ARNOLD,
Attorney for James E. Whitehead, Appellant.

STATE OF OKLAHOMA,
Supreme Court, ss:

Let the Writ of Error issue upon the execution of a bond by James E. Whitehead, plaintiff in error, to James O. Galloway, Winfield S. Pressgrove, The Travellers Insurance Company, and the Atkinson, Warren & Henley Company, a co-partnership, defendants in error, in the sum of Five Hundred ($500.00) Dollars; such bond, when approved, to act as a supersedeas.

Dated on this 31st day of March, A. D., 1917.

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

Filed in the Supreme Court in and for the State of Oklahoma, this March 31st, 1917.

W. M. FRANKLIN,
Clerk Supreme Court, State of Oklahoma.
By N. C. ORR,
Ass't.

19 In the Supreme Court of the State of Oklahoma.

Case No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELERS Insurance Company, and the Atkinson, Warren & Henley Company, a Co-partnership, Defendants in Error.

Assignment of Error.

Now comes the above named James E. Whitehead, the plaintiff in error herein and the plaintiff in the trial court, and files herewith its petition for a writ of error and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

1. The Supreme Court of the State of Oklahoma erred in deciding that, by the terms and provisions of the Act of Congress, approved June 21st, 1906, 34 Stat. L. 342, the said Act of Congress ipso facto established the 29th Recording District of the Indian Territory and that no subsequent organization of such recording district was necessary and that after that date a deed to land in that district, even before the Clerk and ex-officio recorder had been appointed and had qualified and had opened his office in the District for the transaction of business, should properly have been filed in the Recorder's office at Duncan, in the newly established District and not in the office of the old District, in which the land thereby conveyed had formerly been located.

2. The District Court of Carter County, Oklahoma, erred in rendering judgment against the plaintiff in said Court for the same
20 reason.

3. The Supreme Court of the State of Oklahoma erred in deciding that by the terms and provisions of the Act of Congress, approved June 21st, 1906, 34 Stat. L. 342, plaintiff in error's deed to land situated in that portion of the 29th Recording District of the Indian Territory, which was carved out of the 20th Recording District, and which deed was filed for record in the 20th Recording District before any Recorder had been appointed or had qualified for the new 29th Recording District, or any office where the said deed could be filed had been opened, did not convey constructive notice of the conveyance of such land to subsequent purchasers for value and without notice.

4. The District Court of Carter County, Oklahoma, erred in rendering judgment against the plaintiff in said Court for the same reason.

5. That the decision of the Supreme Court of the State of Oklahoma that the plaintiff in error, in order to convey notice to the

public of his title, was required to file his deed at Duncan, in the 29th Recording District of the Indian Territory, before any Recorder for said District had beee nppointed and had qualified, as provided by law, or any office had been opened in said District by such Recorder, deprives the plaintiff in error of his property without due process of law and is in contravention to the 14th Amendment to the Constitution of the United States.

6. The District Court of Carter County, Oklahoma, erred in rendering judgment against the plaintiff in said Court for the same reason.

7. That the Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Carter County, Oklahoma.

For these errors the plaintiff in error, James E. Whitehead, prays that the said judgment of the Supreme Court of the State of
21 Oklahoma be reversed and a judgment rendered in favor of the plaintiff in error, and for costs.

C. S. ARNOLD,
Attorney for James E. Whitehead, Plaintiff in Error.

Filed in the Supreme Court of Oklahoma, March 31st, 1917.
W. M. FRANKLIN,
Clerk,
By N. C. ORR,
Ass't.

22 In the Supreme Court of the State of Oklahoma.

No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELERS Insurance Company, and the Atkinson, Warren & Henley Company, a Co-partnership, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents: That we, James E. Whitehead, as principal, and Hugh Simpson and Julia Whitehead, as sureties, are held and firmly bound unto James O. Galloway, Winfield S. Pressgrove, The Travelers Insurance Company, and the Atkinson, Warren & Henley Company, a co-partnership, in the sum of One Thousand Dollars ($1,000.00), to be paid to the said obligees, their successors, representatives, and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of March, 1917.

Whereas the above-named plaintiff in error hath prosecuted a

writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Supreme Court of the State of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

JAMES E. WHITEHEAD,
Principal.
HUGH SIMPSON,
JULIA WHITEHEAD,
Sureties.

23 STATE OF OKLAHOMA,
County of Oklahoma:

On the 31st day of March, 1917, before me personally appeared James E. Whitehead, to me known to be the person described in and who executed the foregoing bond, and acknowledged to me that he executed the same as his free act and deed.

[SEAL.]

E. E. ELDRIDGE,
Notary Public.

My Commission Expires Oct. 19, 1920.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

Hugh Simpson being duly sworn, deposes and says that he is a resident of the State of Oklahoma, and a free-holder therein, and that he is worth the sum of Ten Thousand dollars ($10,000.00) above all debts and liabilities besides property exempt by law from execution.

HUGH SIMPSON.

Subscribed and sworn to before me this 31st day of March, 1917.

[SEAL.]

E. E. ALDRIDGE,
Notary Public.

My Commission Expires Oct. 19, 1920.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

Julia Whitehead, being duly sworn, deposes and says that she is a resident of the State of Oklahoma, and a freeholder therein, and that she is worth the sum of Ten Thousand Dollars ($10,000.00) in her own right, above all debts and liabilities, besides property exempt by law from execution.

JULIA WHITEHEAD.

Subscribed and sworn to before me this 31st day of March, 1917.

[SEAL.] E. E. ALDRIDGE,
Notary Public.

My Commission Expires Oct. 19, 1920.

24 I hereby approve the foregoing bond and sureties this 31st day of March, 1917.

[SEAL.] J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
WILLIAM FRANKLIN,
Clerk Supreme Court in and for State of Oklahoma.

Endorsed: No. 4214. James E. Whitehead, plaintiff in error, vs. James O. Galloway, et al., defendants in error. Bond on Writ of Error. Filed in Supreme Court of Oklahoma, Mar. 31, 1917. William M. Franklin, clerk.

25 *Writ of Error.*

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

The President of the United States of America, to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between James E. Whitehead and James O. Galloway, Winfield S. Pressgrove, The Travellers Insurance Company, and the Atkinson, Warren & Henley Company, a co-partnership, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath appeared, to the great damage of James E. Whitehead, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send

the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States, the 31st day of March, A. D. 1917.

[Seal District Court of the United States, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States, Western District of Oklahoma.

Allowed:

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

Filed in the Supreme Court in and for Oklahoma, this March 31st, 1917.

W. M. FRANKLIN,
Clerk Supreme Court, Oklahoma.
By N. C. ORR.

26

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James O. Galloway, Winfield S. Pressgrove, the Travelers Insurance Company, and the Atkinson, Warren & Henley Company, a Co-partnership, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein James E. Whitehead is Plaintiff in Error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of Supreme Court of the State of Oklahoma, this 31st day of March, 1917.

[Seal Supreme Court, State of Oklahoma.]

J. F. SHARP,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

WM. F. FRANKLIN,
Clerk of the Supreme Court of Oklahoma.

OKLAHOMA CITY, OKLA., March 31st, 1917.

We, attorneys of record for the defendants in error, in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

H. A. LEDBETTER,
Attorney for Defendants in Error.

27 OKLAHOMA CITY, OKLA., April 2nd, 1917.

We, attorneys of record for defendants in error in the above entitled cause, hereby acknowledge due service of the above citation.

KEATON, WELLS & JOHNSTON,
Attorneys for Defendants in Error, The Travelers Insurance Company, and the Atkinson, Warren & Henley Company.

C. B. STUART, A. C. CRUCE, M. K. CRUCE,
Attorneys for Defendant in Error, James O. Galloway.

Filed in the Supreme Court of Oklahoma, this April 2nd, 1917.

W. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.
By N. C. ORR,
Ass't.

28 In the Supreme Court in an ! for the State of Oklahoma.

No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELERS Insurance Company, and The Atkinson, Warren & Henley Company, a Co-partnership, Defendants in Error.

Supersedeas Order.

This cause coming on to be heard on this March 31st, 1917, upon the application of Plaintiff in Error, James E. Whitehead, for writ of error to the Supreme Court of the United States and an order of supersedeas, and the same having been duly considered:

It is hereby ordered that the application for supersedeas be and the same is hereby allowed, and the judgment of the Supreme Court of the State of Oklahoma is hereby suspended, and the Clerk of said court is hereby directed to recall and stay the mandate of said Supreme Court of the State of Oklahoma until the decision of the Supreme Court of the United States upon said writ of error and a further order of this court.

[SEAL.]

J. F. SHARP,
Chief Justice Supreme Court of Oklahoma.

Attest:

WM. M. FRANKLIN,
Clerk Supreme Court State of Oklahoma.

Endorsed: No. 4214. James E. Whitehead, Plaintiff in Error, vs. James O. Galloway, et al., Defendants in Error. Supersedeas order. Filed in Supreme Court of Oklahoma, Mar. 31, 1917, William M. Franklin, Clerk.

29 In the Supreme Court of the State of Oklahoma.

No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELERS Insurance Company, and The Atkinson, Warren & Henley Company, a Co-partnership, Defendants in Error.

Petition in Error.

The said James E. Whitehead, plaintiff in error, complains of the said James O. Galloway, Winfield S. Pressgrove, the Travellers Insurance Company, and the Atkinson, Warren & Henley Company, a co-partnership, defendants in error, for that the said James O. Galloway, Winfield S. Pressgrove, The Travellers Insurance Company, and the Atkinson, Warren & Henley Company, a co-partnership, at the May Term, 1912, of the District Court of Carter County, State of Oklahoma, recovered a judgment by the consideration of said Court, against the said James E. Whitehead, in a certain action then pending in said Court, wherein the said James E. Whitehead was plaintiff and the said James O. Galloway, Winfield S. Pressgrove, The Travellers Insurance Company, and the Atkinson, Warren & Henley Company, a co-partnership, were defendants.

A duly certified copy of the case-made of the said cause in said Court, duly attested, is hereto attached, marked "Exhibit A" and made a part of this petition in error; and the said James E. Whitehead avers that there is error in the said record and proceedings, in this, to-wit:

(1.) The District Court of Carter County, Oklahoma, erred in rendering judgment for defendants in error upon the trial of said cause.

30 (2.) The District Court of Carter County, Oklahoma, erred in overruling the motion for a new trial filed in the said cause by the plaintiff in error.

Wherefore plaintiff in error prays that the said judgment so rendered may be reversed and that this Court now render judgment herein in favor of plaintiff in error, and for such other relief as to the Court may seem just.

JAMES E. WHITEHEAD,
Plaintiff in Error.

Endorsed: No. 4214. In the Supreme Court of the State of Oklahoma. James E. Whitehead, plaintiff in error, vs. James O. Galloway, et al., defendants in error. Petition in Error. James E. Whitehead, McAlester, Oklahoma, appearing for himself.

Filed July 24, 1912. W. H. L. Campbell, Clerk.

31 In the District Court of Carter County, Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

versus

JAMES O. GALLOWAY et al., Defendants.

Case-Made.

Appearances:

For the Plaintiff, James E. Whitehead.
For the Defendants, Stuart, Cruce & Gilbert, Shartel, Keaton & Wells, H. A. Ledbetter.

Filed Jun- 12, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

32 *Index.*

33 In the District Court of Carter County, Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY et al., Defendants.

Case-made.

Be it remembered, that on the 8th day of June, 1911, the plaintiff, James E. Whitehead, commenced this action against the defendants, James O. Galloway, Winfield S. Pressgrove, The Travellers Insurance

Company, and The Atkinson, Warren & Henley, Company, defendants, by filing in the District Court of Carter County, State of Oklahoma, his petition, which petition is in the words and figures following, to-wit:

Endorsed: Filed Jun- 12 1912, S. F. Haynie, Clerk District Court, Carter County, Oklahoma.
Filed Jul- 24 1912. W. H. L. Campbell, Clerk.

34 In the District Court in and for Carter County, Oklahoma.

No. —.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELLERS Insurance Company, and the Atkinson, Warren & Henley Company, a Copartnership, Defendants.

Petition.

Now comes the plaintiff, James E. Whitehead, and for his cause of action against the defendants, James O. Galloway, Winfield S. Pressgrove, The Travelers Insurance Company and the Atkinson, Warren & Henley Company, alleges:

That he is the owner and entitled to the immediate possession of the following described lands, to-wit:

The east half of the east half of the southwest quarter; and the west half of the west half of the southeast quarter of section four (4), township two (2) south, range three (3) west, in Carter County, Oklahoma.

That plaintiff derived title to the said lands as follows, to-wit:

That the same was, upon the 5th day of April, 1904, allotted to one Wilburn Adams, a Choctaw Indian, as a portion of his surplus allotment; and that upon the 24th day of March, 1906, a patent having been duly and legally executed, was delivered to the said Wilburn Adams, thereby conveying to him the said above described lands, subject to the restrictions and laws of the United States applicable to the Chicasaw & Choctaw Tribes of Indians. That thereafter

35 upon December 18, 1905, the restrictions upon the alienation of the said lands were removed by the Hon. Secretary of the Interior, thereby enabling the said Wilburn Adams to sell and dispose of the same without restriction or condition. That thereafter upon the 27th day of June, 1906, the said Wilburn Adams executed and delivered to this plaintiff his warranty deed conveying said lands to this plaintiff. That the said deed was duly and legally recorded and passed the title in fee simple to this plaintiff in and to the said lands. That ever since the execution of the said deed, this plaintiff has been the owner and entitled to the possession of said lands.

Plaintiff further alleges that the defendants are each now in pos-

session of the said lands. That they have unlawfully kept plaintiff out of the possession of the same for the past five years. That they have collected the rents and had the use, benefit and profit derived from the said lands for the past five years, amounting to the sum of $500.00.

(2.)

Now comes the plaintiff, James E. Whitehead, and for his second and further cause of action against the defendants, James O. Galloway, Winfield S. Pressgrove, the Travellers Insurance Company and the Atkinson, Warren and Henley Company, alleges and states:

That the tenant, J. A. Alford, who was occupying said lands as a renter under the said allottee, Wilburn Adams, was notified by the plaintiff that he had purchased said lands and that the tenant
36 would hold and keep said lands as the tenant of this plaintiff, and not as the tenant of the said Wilburn Adams; that this plaintiff remained in possession of the said lands through his tenant, J. A. Alford till about the 1st day of June, 1907, that upon the 16th day of November, 1906, the defendant, James O. Galloway, through one Baker, his agent, fraudulently and falsely representing to the allottee, Wilburn Adams, that they had purchased the said lands from this plaintiff and that there was a defect in the title and for this reason wanted to get a new deed from the said Wilburn Adams and relying upon said false and fraudulent statements, and believing them to be true, the said Wilburn Adams and wife, without consideration, executed a deed covering the said land to the said James O. Galloway which said deed has been placed of record, in Book 8, page 112 of the deed records of Carter County, Oklahoma.

That thereafter upon the 24th day of December, 1906, the said James O. Galloway and wife executed and delivered to Winfield S. Pressgrove a deed covering the said lands; that the said deed has been placed of record and recorded in Book 8, page 120 of the office of the Register of Deeds of Carter County, Oklahoma, that it is a cloud upon the title of this plaintiff; that the said James O. Galloway and the said Winfield S. Pressgrove purchased the rent contract from this plaintiff's tenant, J. A. Alford and procured possession of the said lands from the said tenant J. A. Alford.

That thereafter on the 22nd day of March, 1907, the said
37 Winfield S. Pressgrove and wife executed and delivered to the defendant, the Travellers Insurance Company two mortgages covering the above described lands and premises; that one of the said mortgages was upon April 5th, 1907, filed for record, and recorded in Book Eight, page One Hundred and Thirty-one of the office of the Register of Deeds of Carter County, Oklahoma, and that the other was upon April 24th, 1907, filed for record and that it was recorded in Book 8, page 142, of the records of the office of the Register of Deeds of Carter County, Oklahoma; that the said mortgages are clouds on the title of this plaintiff.

That the defendant Travelers Insurance Company has assigned over one of its said mortgages to defendants, the Atkinson, Warren & Henley Company who are now asserting a claim to the said lands; that the said assignment is a cloud on the title of this plaintiff.

That at all times hereinbefore mentioned each one of the defendants well knew that this plaintiff was the owner of the said lands; that his deed was duly recorded in the proper recording district and that each of the said defendants at all times hereinbefore mentioned were advised and well knew that this plaintiff was in possession of the said lands through his tenant, J. A. Alford; that each of the said defendants were advised by the said J. A. Alford of the plaintiff's title to the said lands and that the possession of the said lands is now being withheld from this plaintiff throught the collusion and fraud of the said defendants; that by reason of the wrongful acts of the defend-
38 ants, plaintiff has been deprived of the use of said lands for four years, to his damage in the sum of $500.00.

Wherefore, the premises considered the plaintiff prays judgment against said defendants as follows: for the possession of the said lands; for judgment against the said defendants jointly and severally for the sum of $500.00; for the rents and profits upon said lands for the last four years; that the said deed executed March 16th, 1906, by the said Wilburn Adams and wife to the said James O. Galloway, and the deed executed December 24th, 1906, by the said James O. Galloway to the said Winfield S. Pressgrove and the two mortgages executed March 22nd, 1907, by the said Winfield S. Pressgrove and wife to the Travellers Insurance Company be cancelled as clouds on the title of this plaintiff, and that plaintiff have his costs from the defendants.

J. E. WHITEHEAD,
Attorney for the Plaintiff.

STATE OF OKLAHOMA,
County of Pittsburg, ss:

James E. Whitehead, upon oath says that he is the plaintiff in the above and foregoing cause, that he has read the above and foregoing petition and is familiar with its contents; that the matters, facts and things therein set forth are true and correct.

J. E. WHITEHEAD.

Subscribed and sworn to before me this the 2nd day of June, 1912.

MRS. R. H. TARTAR,
Notary Public, Pittsburg County, Oklahoma.

My Commission expires June 24, 1912.

39 On the back of said petition appears the following endorsement: Filed June 8, 1911. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

And afterwards, to-wit: on the 8th day of May, 1912, the defendant, Winfield S. Pressgrove, filed in said Court his separate answer to the petition of plaintiff, which answer is in the words and figures following, to-wit:

40 In the District Court of Carter County, Oklahoma, at Ardmore.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY et al., Defendants.

Separate Answer of Winfield S. Pressgrove.

Now comes the defendant Winfield S. Pressgroves and for his separate answer herein and denies each and every allegation contained in the petition of the plaintiff.

Further answering, he says that he purchased the land described in plaintiff's petition from James O. Galloway who in turn purchased the same from Wilburn Adams the allottee of said land and at the time of the purchase by said Galloway, Wilburn Adams had his restrictions removed.

This defendant further says that he purchased said land in good faith, for a good and valuable consideration without any notice either actual or *construction* of the existence of any other deed and more particularly the deed of the plaintiff as set out in his said petition, and at the time defendant purchased said land he went into immediate possession of said land and is now in possession of the same.

41 Further answering, this defendant says that the plaintiff never was in possession of said land and the deed on which plaintiff relies was never recorded in the 29th recording District where said land is situated, and at the time of the taking of said deed by the plaintiff, the 29th Recording District was the place for recording such conveyances claimed by the plaintiff, and this defendant not having either actual or constructive notice of the deed of the plaintiff, and the plaintiff not being in possession of said land, said deed so taken by the plaintiff conveyed no title in him as against this defendant, and now having fully answered, he asks that the plaintiff take nothing by his said suit, that the plaintiff's pretended claim of title be held to be inferior to the title of this defendant and that he recover all his costs herein expended.

H. A. LEDBETTER,
Att'y for Defendant.

I, H. A. Ledbetter on oath state that I am attorney for the defendant herein; that the facts as alleged in the above and foregoing answer are within my personal knowledge. I further state that the allegations and statement contained above are true as I verily believe.

H. A. LEDBETTER.

Subscribed and sworn to before me this 7th day of May, 1912.

____ ____,
Notary Public.

On the back of said Separate answer of Winfield S. Pressgroves appears the following endorsement: Filed in Open Court May 8, 1912. F. S. Haynie, Clerk District Court, Carter County, Oklahoma.

42 And afterwards, to-wit, on the 8th day of May, 1912, the defendant The Travellers Insurance Company, filed in said Court its separate answer to the petition of plaintiff, which answer is in the words and figures following, to wit:

43 In the District Court of Carter County, Oklahoma, at Ardmore.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY ET AL, Defendants.

Answer of the Travellers Insurance Company, and Atkinson, Warren & Henley Company.

Now comes the defendants, the Travellers Insurance Company, and Atkinson, Warren & Henley Company, and for their separate answers herein, and denies each and every allegation contained in the petition of the plaintiff.

Further answering, these defendants say that they loaned the defendant, Winfield S. Pressgrove, money on the land described in plaintiff's petition without any notice, either or constructive, or any deed held by the plaintiff, and at a time when said defendant Pressgroves was in the actual possession of said land, and at a time when the said Pressgroves held a deed to said land duly acknowleedged and recorded, the recording of which was at Duncan, which was the proper recording district, the land being situated in said Duncan, Indian Territory, recording district, and by reason of which they are innocent mortgagees for value.

Now, having fully answered, they ask that the plaintiff take nothing by his said suit, and that they be dismissed with their costs, and that they have all other relief that they may be entitled —.

SHARTELL, KEATON & WELLS AND
H. A. LEDBETTER,
Att'ys for Defendants.

44 I, H. A. Ledbetter, on oath state that I am one of the attorneys for the defendants named above; that the statements made therein are within my personal knowledge. I further state that the statements made above are true, as I verily believe.

H. A. LEDBETTER.

Subscribed and sworn to before me this May 7th, 1912.

____ ____,
Notary Public.

On the back of said Separate answer appears the following endorsements: Filed in Open Court, May 8, 1912. S. F. Haynie, Clerk of the District Court, Carter County, Oklahoma.

45 And afterwards, to-wit, on the 8th day of May, 1912, the defendant, J. O. Galloway, filed in said Court his separate answer to the petition of plaintiff, which answer appears in the words and figures following, to-wit:

46 In the District Court of Carter County, Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY ET AL, Defendants.

Answer of Defendant, J. O. Galloway.

Now comes the defendant, James O. Galloway, and for his separate answer to the petition filed herein denies each and every, and all and singular, the allegations contained in plaintiff's petition.

STUART, CRUCE & GILBERT,
Attorneys for James O. Galloway.

On the back of said answer of J. O. Galloway appears the following endorsement: Filed in Open Court, May 8, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

47 *Trial.*

And afterwards, to-wit, on the 8th day of May, 1912, same being one of the regular judicial days of the May, 1912, term of said Court, this cause came on for hearing on its merits before the Honorable Stillwell H. Russell, judge of said Court, the plaintiff appearing in person, and the defendants appearing by H. A. Ledbetter and A. C. Cruce, their attorneys, whereupon this cause was submitted to the Court upon an agreed statement of facts, agreed to by counsel for plaintiff and defendants, which agreed statement of facts appears in the words and figures following, to-wit:

48 In the District Court of Carter County, Oklahoma.

No. 1090.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELLERS Insurance Company, and Atkinson, Warren & Henley Company, Defendants.

Agreed Statement of Facts.

It is hereby stipulated and agreed by and between the plaintiff James E. Whitehead, and the defendant James O. Galloway, by his attorneys, Stuart, Cruce & Gilbert, and Winfield S. Pressgrove by H. A. Ledbetter his attorney, and the Travellers Insurance Company, and the Atkinson, Warren & Henley Company through their counsel Shartel, Keaton and Wells, that this cause may be tried upon the following agreed statement of facts, viz;

I. That the land in controversy, the east half of the east half of the southwest quarter, and the west half of the west half of the southeast quarter of section 4, township 2 south, range 3 west, were allot-ed to Wilburn Adams on the 5th day of April, 1904, as a portion of his surplus allotment; said lands being situated in Carter County Oklahoma; and that patents have been duly issued covering said lands, and that same were duly recorded in compliance with law.

II. That upon the 18th day of December, 1905, the restrictions upon the alienation of said lands were removed by the Secre-

49 tary of the Interior in compliance with law.

III. That on the 27th day of June, 1906, Wilburn Adams executed and delivered to the plaintiff James E. Whitehead his warranty deed covering said lands, for the consideration of Five Hundred Dollars; a copy of which deed is hereto attached marked Exhibit "A" and made a part hereof; and that said deed was filed for record in the office of the 20th recording District at Ryan, Indian Territory, upon the 28th day of June, 1906, and duly recorded in the deed record 13 at page 223 thereof.

IV. It is further agreed that James O. Galloway procured from Wilburn Adams and wife Emma Adams a warranty deed covering the lands described herein; said deed being dated November 16, 1906, and recorded November 22, 1906, in Miscellaneous Book 8, page 112 in the office of the 29th Recording District of the Indian Territory, at Duncan; and that said Galloway at that time went into possession of said lands, and that on the 24th day of December, 1906, the said James O. Galloway and wife Sudie Galloway conveyed by warranty deed the lands described herein to Winfield S. Pressgrove, the same was recorded in Book 8, page 120 of the records of the 29th Recording District of the Indian Territory, at Dun-

can; and that said Winfield S. Pressgrove and wife Nannie Pressgrove executed to the Travellers Insurance Company of Hartford, Conn., a mortgage on said lands, the same being dated March 22, 1907, and recorded April 5th, 1907, in book 8, at page 131 in the office of the 29th Recording District at Duncan, Indian Territory;
said mortgage being given to secure an indebtedness by said
50 Winfield S. Pressgrove to the Travellers Insurance Company
of $400.00; and that said Winfield S. Pressgrove and wife Nannie Pressgrove, husband and wife, executed to the Atkinson, Warren and Henley Company a mortgage*d* dated March 22, 1907, and recorded April 24, 1907, in Book 8, at page 142 in the office of the 29th recording District of the Indian Territory, at Duncan, Indian Territory; said last mentioned mortgage being given to secure an indebtedness of $61.50; and that said Travellers Insurance Company bargained, sold, conveyed and transferred that certain indenture of mortgage made by Winfield S. Pressgrove and Nannie Pressgrove in favor of the said Travellers Insurance Company, bearing date of March 22nd, 1907, and that said assignment was filed for record in the 29th Recording District of the Indian Territory November 12, 1907, in Book 8 page 193. Copies of which said instruments are hereto attached and made a part hereof, marked Exhibits B, C. D, E, F, & G", respectively.

V. That on the 21 day of June, 1906, the President of the United States approved an Act of Congress, a copy of which is as follows, to wit:

"That in addition to the places now provided by law for holding courts in the southern judicial district of Indian Territory Court shall be held in the town of Duncan, and all laws regulating the holding of the court of the Indian Territory shall be applicable to the said court hereby created in said town of Duncan. That the Territory next hereinafter described shall be known as recording district number twenty-nine, beginning at a point where township line between townships two and three north reaches the east boundary line of Oklahoma Territory; thence east on said township line twenty-four miles to where it intersects with range line three and four west; thence south on said range line twelve miles to where it intersects the base line between townships one north and one south; thence east along said base line six miles to the range line between ranges two and three west; thence south twelve miles along said range line to the township line between townships two and three south; thence west thirty miles along said township line to
51 where it intersects with the east line of Oklahoma Territory;
thence north along said line twenty-four miles to the place of beginning; and the place of recording and holding court in said district shall be Duncan." "The Act of Feb. 19, 1903, above referred to, is set forth in 10 Fed. Stat. Annot. 130."

VI. That prior to the passage of the above mentioned Act of Congress the lands involved in this action were located in the 20th Recording District of the Indian Territory, commonly known as the "Ryan District", and that said lands are included in the territory described in the above mentioned Act of Congress and constituted

a part of the 29th recording District of the Indian Territory, commonly known as the "Duncan Recording District", and that said lands has ever since statehood comprised a part of the territory known as Carter County, Okla.

VII. It is further stipulated and agreed that on the 30th day of June, 1906, C. M. Campbell who was then Clerk of the United States Court for the Southern District of the Indian Territory appointed and designated C. N. Jackson as deputy clerk and ex-officio recorder for the newly created 29th Recording District of the Indian Territory with headquarters at Duncan; that the appointment of said C. N. Jackson on said date was the first and only appointment ever made as deputy clerk and ex-officio recorder for the 29th recording District; and that said C. N. Jackson took and subscribed to the oath of office and filed his bond upon the 30 day of June, 1906, and that the appointment of said C. N. Jackson was duly approved by the United States Court at Ardmore on the 30 day of June, 1906; that the newly appointed deputy clerk
52 and ex officio recorder, C. N. Jackson arrived at Duncan and first opened his office upon the 7th day of July, 1906, and that the first entry made upon the books was upon July 7th, 1906; and that prior to the appointment of C. N. Jackson as such deputy clerk and ex officio recorder for the 29th recording district of the Indian Territory there has been no other person appointed to fill said office by C. M. Campbell, Clerk of the United States Court for the Southern District of the Indian Territory, and that no office had been opened at Duncan by said C. M. Campbell, Clerk of the United States Court for the Southern District of the Indian Territory prior to the 7th day of July 1906 when said C. N. Jackson arrived at Duncan and opened the office.

VIII. That from the time said Winfield S. Pressgrove took the conveyance to said lands upon the 24th of December, 1906, and to this day he the said Winfield S. Pressgrove has been in actual possession of said lands.

IX. It is further stipulated and agreed that if the plaintiff recovers he shall be entitled to sixty dollars per year for five years, or in the aggregate of three hundred dollars as rents accruing for the years that the plaintiff has been withheld from possession of said lands, as against the defendant Winfield S. Pressgrove.

Dated this May 7th, 1912.

JAMES E. WHITEHEAD,
Plaintiff.

WINFIELD S. PRESSGROVES,
By H. A. LEDBETTER,
His Attorney.

JAS. O. GALLOWAY,
By STUART, CRUCE & GILBERT,
Attorneys.

TRAVELLERS INSURANCE CO. & ATKINSON,
WARREN & HENLEY CO.,
By SHARTEL, KEATON & WELLS, AND
H. A. LEDBETTER,
Its Attorney-.

53 Attached to said Agreed Statement of Facts, and marked Exhibit "A", appears the following:

Warranty Deed—With Relinquishment of Dower.

Know All Men by these Presents: That I Wilburn Adams, and —— —— his wife of Gowen, Indian Territory, for and in consideration of the sum of Five Hundred and No/100 dollars, to us paid by James E. Whitehead, of South McAlister, Indian Territory the receipt of which is hereby acknowledged have granted bargained and by these presents do grant bargain sell and convey unto the said James E. Whitehead, and unto his heirs, administrators, executors and assigns the following described real estate situated in Chickasaw Nation, Indian Territory, to-wit: the east half of the east half of the southwest quarter (¼) and the west half of the west half of the southwest quarter of section four (4), township two (2) south, range three (3) west in the Chickasaw Nation, Indian Territory, with all the privileges appurtenances, and improvements thereupon situated appertaining and thereunto belonging. To have and to hold unto the said James E. Whitehead heirs and assigns forever. And I the said Wilburn Adams for myself my executors, and administrators do covenant with the said James E. Whitehead her heirs and assigns that I am lawfully seized in the fee simple of the aforegranted premises, that they are free from all incumbrances; that I have a good right to convey the same as herein done. That I will and my executors and administrators shall forever
54 warrant and defend the same to the quiet enjoyment of said James E. Whitehead his heirs and assigns against all lawful claims and demands of all persons. In testimony whereof we hereunto set our hands and affix our seals this 27th day of June A. D. 1906.

[SEAL.] WILBURN ADAMS.

Acknowledgment.

INDIAN TERRITORY,
Central District:

Before me R. A. Horton Notary Public within and for said district and territory aforesaid personally appeared on the 27th day of June 1906, Wilburn Adams, to me well known as the party grantor in the foregoing deed and acknowledged that he had executed the same for the consideration and purposes therein mentioned and set forth. And further acknowledged that he was a single man. And I do so certify. In testimony whereof, I hereunto set my hand this 27th day of June, A. D. 1906.

[SEAL.] R. A. HORTON,
Notary Public.

My commission expires May 21, 1910.

Endorsed: Filed for record at Ryan June 28, 1906, 4 P. M., L. E. Freimel, Ex-officio Recorder, District No. 21, Ind. Ter. Fee $1.25 Paid.

Also attached to said Agreed Statement of Facts appears the following, marked Exhibit "B".

55 *General Warranty Deed.*

INDIAN TERRITORY,
Southern District, ss:

Know All Men By These Presents: That I, Wilburn Adams, of Gowen, I. T., and Emma Adams, his wife, for and in consideration of the sum of Two Hundred ($200.00) Dollars to me in hand paid by James O. Galloway, of Duncan, I. T., the receipt of which is hereby acknowledged, have bargained sold and conveyed and by these presents do bargain, sell and convey unto the said James O. Galloway the following described property, to-wit:

The west one half of the west one half of the southeast one fourth and the east one half of the east one half of the southwest one fourth (W. 2 of the W. 2 of the S. E. 4) and (the E. 2 of the E. 2 of the S. W. 4) all being in section four (4), township two, south of range three west of the I. M. To have and to hold the above described premises together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said James O. Galloway his heirs and assigns, forever; and I do hereby bind myself, my heirs and legal representatives to warrant and forever defend all and singular the said premises unto the said James O. Galloway, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof. In witness whereof I have hereunto set my hand on this the 16th day of November, 1906.

WILBURN ADAMS.
EMMA ADAMS.

56 *Acknowledgment.*

INDIAN TERRITORY,
Central District, ss:

Before me the undersigned authority, a Notary Public within and for the Central District of Indian Territory on this day personally appeared Wilburn Adams to me well known as the grantor in the foregoing deed, and stated that he had executed the same, for the consideration and purposes therein mentioned and set forth. And on the same day also voluntarily appeared before me, Emma Adams, wife of the said Wilburn Adams, to me well known as the person signing said deed, and in the absence of her husband, declared that she had of her own free will signed the relinquishment of dower in the foregoing deed for the purposes therein contained and set forth, without compulsion or undue influence of her husband. Witness my hand and official seal as such Notary Public on this the 16 day of November, 1906.

R. J. EVANS,
Notary Public.

My commission expires Oct. 3, 1909.

Endorsed: Filed at Duncan Nov. 22, 1906, 5 P. M. J. N. Jackson, Ex officio Recorder. District 29, I. T. [SEAL.]

Also attached to the agreed statement of facts herein and marked Exhibit "C" appears the following:

Warranty Deed.

57 INDIAN TERRITORY,
Southern District:

Know all men by these presents: That I James O. Galloway and his wife, Sudie Galloway, of Duncan, Ind. Ter., for and in consideration of the sum of eight hundred —(200.00) Dollars, to me in hand paid by Winfield S. Pressgrove, of Velma, Ind. Ter. the receipt whereof is hereby acknowledged, has granted sold and conveyed and by these presents do grant sell and convey unto the said Winfield S. Pressgrove his heirs and assigns, the following described premises, to-wit: The west one half, of the west one half of the southeast one fourth and the east one half of the east one half of the southwest one fourth (The W. 2 of the W. 2 of the S. E. 4 and the E. 2 of the E. 2 of the S. W. 4) all being in Section four (4) Township two south (T. 2 S.) of Range three west) R. 3 W. I. M. To have and to hold, the above described premises together with all and singular, the rights and appurtenances thereto, in any wise belonging unto the said Winfield S. Pressgrove heirs and assigns forever. And I hereby covenant with the said Winfield S. Pressgrove that I am lawfully seized in fee of said premises; that they are free from all encumbrances. That I have good right to sell and convey the same, and that We will and our heirs, executors administrators and assigns, shall forever warrant and defend the title to said premises against all lawful claims and demands whatsoever. And I, Sudie Galloway wife of James O. Galloway for the consideration above mentioned hereby waive, sell, relinquish and forever quit claim unto the said Winfield S. Pressgrove his heirs and assigns, all my
58 right, or possibility of dower and homestead in and to the premises above described. In witness whereof we have hereunto set our hands, on this the 24th day of December, 1906.

JAMES O. GALLOWAY.
SUDIE GALLOWAY.

INDIAN TERRITORY,
Southern District, ss:

Before me, the undersigned authority, a Notary Public, within and for the Southern District of the Indian Territory, this day personally appeared James O. Galloway to me well known as the grantor in the foregoing deed and stated that he had executed the same for the consideration and purposes therein mentioned and set forth. And on the same day also voluntarily appeared before me Sudie Galloway, wife of the said James O. Galloway to me well

known as the person signing said deed, and in the absence of her husband declared that she had of her own free will signed the relinquishment of dower and homestead in the foregoing deed for the purposes therein contained and set forth, without compulsion or undue influence of her husband. Witness my hand and official seal as such Notary Public on this the 24th day of December, 1906.

D. A. FOWLER,
Notary Public.

My commission expires Aug. 16, 1908.

Endorsed: Filed for record at Duncan, Dec. 31, 1906, 4 P. M. J. N. Jackson, Ex officio Recorder, District No. 29, Ind. Ter.

59 (Also attached to the Agreed Statement of Facts, and marked Exhibit "D" appears the following:)

Real Estate Mortgage.

This indenture made this twenty-second day of March A. D. one thousand nine hundred and seven, by and between Winfield S. Pressgrove, and Nannie Pressgrove, husband and wife of Indian Territory parties of the first part, and the Travelers Insurance Company, of Hartford, Connecticut, party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of four hundred and no/100 dollars, in hand paid by the said party of the second part, to the said parties of the first part, receipt of which is hereby acknowledged, have granted, bargained, sold and conveyed and by these presents grant, bargain, sell and convey unto the said party of the second part and to its heirs, executors, administrators and assigns (or successors and assigns, as the case may be) forever, all the following described tract, piece or parcel of land lying and situate in the Twenty-ninth Recording District in the Chickasaw Nation, Indian Territory, to-wit: The east half of the east half of the southwest quarter, and the west half of the west half of the southwest quarter all in section four (4) township two (2) south, range three (3) west of the Indian Meridian, containing eighty acres, more or less, according to the government survey thereof. To have and to hold the same, with all and singular the hereditaments and appurtenances thereunto belonging, or

in anywise appertaining unto the said party of the second
60 part it- heirs, executors administrators and assigns or successors and assigns forever.

And the said parties of the first part for them and their heirs, executors administrators and assigns do hereby covenant and agree to and with the said party of the second part, that at the delivery hereof, they are the lawful owners of the premises above granted, and seized and possessed in fee of an absolute and indefeasible estate of inheritance therein; that they have a good right to sell and mortgage the same as aforesaid; that they have done no act to encumber said premises, and that the same are free and clear of all encum-

brances whatsoever, and that they will, and their heirs, executors administrators and assigns shall forever warrant and defend the same all and singular in the quiet and peac-able possession of the said party of the second part, its heirs, executors administrators and assigns (or successors and assigns) against the lawful claims and demands of all persons whomsoever. And I, Nannie Pressgrove, wife of the said Winfield S. Pressgrove, for the consideration and purposes aforesaid, do hereby relinquish, quitclaim transfer and convey unto the said second party its heirs, executors administrators and assigns (or successors and assigns) all my right, claim or possibility of dower and homestead in and to said real estate forever. Provided always, and this instrument is made, executed and delivered upon the following conditions, to-wit:

First. Said parties of the first part are justly indebted to the said party of the second part in the principal sum of four hundred and no/100 dollars being for a loan made by the said party of the
61 second part to the said parties of the first part, and payable according to the tenor and effect of their one certain negotiable promissory note executed and delivered by the said parties of the first part bearing date March 22, 1907, and payable to the order of the said The Travelers Insurance Company of Hartford Connecticut, on the first day of December 1914, at its office in Hartford, Connecticut, with interest thereon from the date until maturity at the rate of six per cent per annum payable annually which interest is evidenced by eight coupon interest notes of even date herewith and executed by the said parties of the first part one (the first) for Sixteen and 54/100 dollars due on the first day of December 1907, and seven notes for twenty-four dollars due on the first day of December, 1908, 1909, 1910, 1911, 1912, 1913 1914, respectively. Each of said principal and interest notes bear interest after maturity at the rate of eight per cent per annum, and are made payable to the order of the said The Travelers Insurance Company at Hartford, Connecticut.

Second. Said parties of the first part hereby agrees to pay all taxes and assessments levied upon said premises, or chargeable against said mortgage and promissory note, or interest when the same is due, and that they will pay any and all premiums for the amount of insurance hereinafter specified, and if not so paid, then said party of the second part, or the legal holder or holders of this mortgage may, with*out* or without notice declare the whole sums of money herein secured due and payable at once, and may elect to pay such taxes, charges assessments, and premiums; and the amount so paid shall be a lien on the premises aforesaid, and be secured by this mortgage and collected in the same manner as the princi-
62 pal debt hereby secured with interest thereon at the rate of eight per cent per annum from the date of any such payment until paid. But whether the legal holder or holders of this mortgage elect to pay such taxes, assessments and insurance premiums or not, it is distinctly understood and agreed that the legal holder or holders hereof may immediately cause this mortgage to be foreclosed, and shall be entitled to immediate possession of the premises, and the

rents issues and profits thereof, but a failure to begin foreclosure proceedings upon default in anywise, either in the foregoing payments or any payments or conditions hereinafter provided for shall not be held to be a waiver of such default.

Third, First parties hereby agree to pay the said promissory note and the interest thereon promptly when due; and in case first parties make default in any of said payments, principal or interest, when due, this mortgage shall become immediately due and payable at the option of the second party.

Fourth. Said parties of the first part hereby agree to keep all buildings, fences and other improvements upon said premises in as good condition and repair and conditions as the same are in at this date, and to abstain from the commission of any waste upon said premises.

Fifth. The said parties of the first part hereby agree to procure and maintain policies of insurance on the buildings erected and to be erected upon the above described premises in some responsible insurance company to be approved by the legal holder or holders of this mortgage, to the amount of —— dollars, loss if any,
63 payable to the mortgagee, —— heirs, executors, administrators and assigns (or successors and assigns) as interest may appear with the usual mortgage clause in favor of the mortgagee attached. And it is further agreed that every such policy of insurance shall be held by the party of the second part, or the legal holder or holders of said note as collateral or additional security for the payment of the same, and the person or persons so holding any such policy of insurance shall have the right to collect and receive any and all moneys which may at any time become payable and receivable thereon and apply same, when received to the payment of said note and interest thereon together with the costs and expenses incurred in collecting said insurance, or may expect to have the buildings repaired or new buildings erected on the aforesaid mortgaged premises. Said party of the second part, or the legal holder or holders of said note may deliver said policy or policies to said party of the first part, and require collection of the same and payment made out of the proceeds as last above mentioned.

Sixth. Said parties of the first part hereby agrees that if the maker of said note shall fail to pay or cause to be paid, any part of said money, either principal or interest when same becomes due, or in case of any of the representations made herein or to induce the making of this land being found incorrect) according to the tenor and effect of said note, or failure to conform or comply with any of the foregoing conditions or agreements, the whole sums of money hereby secured shall, at the option of the legal holder or holders
64 thereof, become due and payable at once, with or without notice and this mortgage may thereupon be foreclosed immediately for the whole of said money, interest and costs, together with the statutory damages in case of protest by said second party or any legal holder thereof. And in case of foreclosure said grantee, or its heirs, executors, administrators or assigns (or successors' assigns) shall have the power to sell said property at public sale to

the highet bidder for cash, in Chickasaw Nation, Indian Territory, public notice of the time and place of said sale having first been given by advertising for ten days in some newspaper published in Chickasaw Nation, Indian Territory, by at least two insertions or by written or printed notices posted in five public places in Chickasaw Nation, Indian Territory, for a period of ten days immediately prior to such sale; at which sale the second part or its heirs, executors administrators assigns (or successors or assigns) may bid and purchase as any third party might do. And it is hereby agreed that the said grantee, his heirs, executors administrators or assigns (or successors and assigns) shall have the privilege of selling said property together or in lots or parcels as to it shall deem expedient; and they hereby authorize the said second party, its heirs, executors administrators or assigns (or successors or assigns) to convey and absolute title therein and the recitals of the deed of conveyance shall be taken as prima facie true, and the proceed of said sale shall be applied, first to the payment of all costs and expenses of said sale, second to the payment of the debts and interests thereon secured, and the remainder
65 or residue if any there be, shall be paid to the grantor or their heirs, executors administrators or assigns. In case an action, for the foreclosure of this mortgage shall be brought in any court of record having jurisdiction thereof, second party shall be forthwith entitled to the immediate possession of the above described premises and may at once take possession and receive and collect the rents issue and profits thereof. The sole consideration of this indebtedness is a loan of money, and the said parties of the first part, for said consideration do hereby especially waive all right of appraisement, homestead, sale and redemption of said real estate as provided by law. The foregoing conditions being performed, this conveyance to be void, otherwise to remain in full force and effect. In testimony whereof, the said parties of the first part hereunto subscribe their names and affix their seals on the day and year first above written.

WINFIELD S. PRESSGROVE. [SEAL.]
NANNIE PRESSGROVE. [SEAL.]

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

On this 5th day of April, A. D. 1907, appeared in person before me, a Notary Public in and for the district and territory aforesaid, Winfield S. Pressgrove to me well known as the person who signed the above and foregoing instrument of conveyance as one of the parties grantor, and stated and acknowledged that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify. And I further certify
66 that on the same day voluntarily appeared before me in person Nannie Pressgrove wife of the said Winfield S. Pressgrove to me well known as such and as the person whose name appears upon the within and foregoing instrument of writing as one of the parties grantor and in the absence of her said husband, declared she had of her own free will executed the above and foregoing instrument of

conveyance, and signed and sealed the relinquishment of dower and homestead in the said instrument of conveyance for the consideration and purposes therein mentioned and set forth without compulsion or undue influence on the part of her said husband. In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

[SEAL.] D. A. FOWLER,
Notary Public.

My commission expires Aug. 16, 1908.

Endorsed: Filed for record at Duncan, April 5, 1907, 3 P. M. J. N. Jackson, ex officio recorder, District No. 29, Ind. Ter. $2.75.

(Also attached to the Agreed Statement of Facts, and Marked Exhibit E, appears the following:)

Second Real Estate Mortgage.

This indenture made this 22nd day of March, A. D. One thousand nine hundred and seven by and between Winfield S. Pressgrove and Nannie Pressgrove, husband and wife, of Indian Territory, parties of the first part, and the Atkinson, Warren and Henley Co., a
67 corporation, of Oklahoma City, Oklahoma, party of the second part,

Witnesseth: that the said parties of the first part, for and in consideration of the sum of sixty-one and 50/100 dollars, in hand paid by the said party of the second part to the said parties of the first part, the receipt of which is hereby acknowledged, have granted, bargained, sold and conveyed and by these presents do hereby grant, bargain, sell and convey unto the said party of the second part and to its successors and assigns forever, all the following described tract, piece or parcel of land, lying, and situated in the 29th Recording District in the Chickasaw Nation, Indian Territory, to-wit:

East half of east half of *w*outhwest quarter, and west half of west half of southeast quarter of section four (4), Township two (2) south, range Three (3) west of the Indian Meridian, containing 80 acres, more or less, according to the Government survey thereof.

To have and to hold, the same with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining unto the said party of the second part, its successors and assigns forever. And the said parties of the first part for them and their heirs, executors, administrators and assigns do hereby covenant and agree to and with the said parties of the second part, that at the delivery hereof they are the lawful owners of the premises above granted, and seized and possessed in fee of an absolute and indefeasible estate of inheritance therein; that they have good right to sell and mortgage the same as aforesaid; that they have done no act to encumber said premises and that the same are free and clear
68 of all encumbrances whatsoever except a mortgage dated March 22, 1907, to the Travelers Insurance Company for $400.00 and interest, which is a prior and first lien to that hereby cre-

ated, and that they will, and their heirs, executors and administrators and assigns shall forever warrant and defend the same all and singular in the quiet and peaceable possession of the said party of the second part, its successors and assigns against the lawful claim and demands of all persons whomsoever.

And I, Nannie Pressgrove, wife of the said Winfield S. Pressgrove for the consideration and purposes aforesaid, do hereby relinquish, quitclaim, transfer and convey unto the said second part, its successors and assigns, all my right, claim or possibility of dower and homestead in and to said real estate forever. Provided always. And this instrument is made, executed and delivered upon the following conditions, to-wit: First, said parties of the first part are justly indebted to the said party of the second part in the principal sum of sixty one and 50/100 dollars and payable according to the tenor and effect of their eight certain promissory notes bearing date March 22, 1907, and payable one for $5.50 due Dec. 1, 1907, and seven notes for $8.00 each, due December 1, 1908; 1909, 1910, 1911, 1912, 1913 and 1914.

Second. Said parties of the first part hereby agree to pay all taxes and assessments levied upon said premises or chargeable against said mortgage and promissory notes or interest, when the same are due and to keep all improvements in good repair, and not to com-
69 mit or allow waste to be committed on the premises, and if default be made in any of such payments, or if default be made in the payment of any amount secured by the first mortgage above referred to, or any condition of said first mortgage be broken, the said party of the second part, or the legal holder or holders of this mortgage may, with or without notice, declare the whole sum of money herein secured due and payable at once, and they may elect to pay such taxes, charges, assessments and premiums and the amount so paid shall be a lien on the premises aforesaid, and be secured by this mortgage and collected in the same manner as the principal debt hereby secured, with interest thereon at the rate of eight per cent per annum, from the date of any such payment until paid. But whether the legal holder or holders of this mortgage elect to pay such taxes, assessments and insurance premiums or not, it is distinctly understood and agreed that the legal holder or holders hereof may immediately cause this mortgage to be foreclosed, and shall be entitled to immediate possession of the premises, and the rents, issues and profits thereof. But a failure to begin foreclosure proceedings upon default in anywise either in the foregoing payments or any payments or conditions hereinafter provided for, shall not be held to be a waiver of such default. Third, First parties hereby agree to pay the said promissory notes and the interest thereon promptly when due; and in case first parties make default in any of said payments, principal or interest, when due, this mortgage shall become immediately due and payable at the option of the second party. Fourth, And in case of foreclosure, said grantee, or its heirs, executors, adminis-
70 trators or assigns (or successors or assigns) shall have the power to sell said property at public sale to the highest bidder for cash in the Chickasaw Nation, Indian Territory, public notice of the time and place of said sale having first been given by adver-

tising for ten days in some newspaper published in the Chickasaw Nation, Indian Territory, by at least two insertions, or by written or printed notices posted in five public places in Chickasaw Nation, Indian Territory, for a period of ten days immediately prior to said sale; at which sale the second party or its heirs, executors, administrators or assigns (or successors or assigns) may bid and purchase, as any third party might do. And it is hereby agreed that the said grantee, its successors or assigns shall have the privilege of selling said property together or in lots or parcels as to it shall seem expedient; and they hereby authorize the said second party its successors or assigns, to convey an absolute title therein, and the recitals of the deed of conveyance shall be taken as prima facie true, and the proceeds of said sale shall be applied, first to the payment of all costs and expenses of said sale, second to the payment of the debts and interest therein secured, and the remainder, or residue, if any there be, shall be paid to the grantor, or heirs, executors, administrators or assigns. In case an action for the foreclosure of this mortgage shall be brought in any court of record having jurisdiction thereof, second party shall be forthwith entitled to the immediate possession of the above described premises and may at once take possession and receive
71 and collect the rents, issue and profits thereof. And the said parties of the first part, for said consideration, do hereby especially waive all right of appraisement, homestead, sale and redemption of said real estate as provided by law. The foregoing conditions being performed this conveyance to be void; otherwise to remain in full force and effect.

In Testimony Whereof, the said parties of the first part hereunto subscribe their names and affix their seals on the day and year above written.

WINFIELD S. PRESSGROVE. [SEAL.]
NANNIE PRESSGROVE. [SEAL.]

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

On this 5th day of April, A. D. 1907, appeared in person before me a Notary Public, in and for the district and territory aforesaid, Winfield S. Pressgrove to me well known as the person who signed the above and foregoing instrument of conveyance as one of the parties grantor and stated and acknowledged that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify. And I further certify that on the same day voluntarily appeared before me, in person Nannie Pressgrove wife of the said Winfield S. Pressgrove to me well known as such and as the person whose name appears upon the within and foregoing instrument of writing as one of the parties grantor, and in the absence of her said husband, declared that she had of her own free will executed the above and foregoing instrument of conveyance and signed and sealed the relinquishment of dower and *and*
72 homestead in the said instrument of conveyance for the consideration and purposes therein mentioned and set forth, without compulsion or undue influence on the part of her said hus-

band. In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

[SEAL.]

D. A. FOWLER,
Notary Public.

My commission expires August 16, 1908.

Endorsed: Filed for record at Duncan, April 24, 1907, 10 A. M. J. N. Jackson, Ex-officio Recorder District No. 29, Ind. Ter. $1.75.

(Also attached to the Agreed Statement of Facts, and Marked Exhibit F, appears the following:)

Know all Men by These Presents: That the Travelers Insurance Company, a corporation of the city of Hartford, County of Hartford, and state of Connecticut, in consideration of the sum of one dollar ($1.00) lawful money of the United States, to it in hand paid by The Atkinson, Warren & Henley Co., of Oklahoma City, Oklahoma, a corporation organized under the laws of Oklahoma, at or before the ensealing and delivery of these present, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said The Atkinson, Warren & Henley Company, a certain indenture of mortgage made and executed by Winfield S. Pressgrove and Nannie Pressgrove, husband and wife, of Indian Territory, in favor of the said The Travelers Insurance Company, bearing date the 22nd day of March, in the year one thousand nine hundred and seven, upon the following described real estate in Chickasaw Nation, Indian Territory, to-wit: The east half of the east half of the southwest quarter and the west half of the west half of the southeast quarter of section four (4), township Two (2) south, range three (3) west of the Indian Meridian, and recorded in the office of the Register of Deeds of the Southern District, Indian Territory, in Misal, Record Number 4, page 237 to which reference may be had, together with the debt note and obligation therein described, and the money due or to become due thereon with the interest, without recourse to the aforesaid assignor.

73

To have and to hold the same unto the said The Atkinson, Warren & Henley Company, their successors and assigns forever, subject only to the provisions of said indenture of mortgage mentioned; and the said The Travelers Insurance Company does hereby make, constitute and appoint the said The Atkinson, Warren & Henley Company its true and lawful Attorney, irrevocable in its name or otherwise, but are its own proper costs and charges, to have, use and take all lawful ways and means for the recovery of the said money and interest; and in case of payment, to discharge the same as fully as it might or could do if these presents were not, made, without recourse to the aforesaid assignor. In witness whereof, said The Travelers Insurance Company has caused its corporate seal to be hereto affixed and this instru-

ment to be executed by its President and attested by its Secretary, this the 2nd day of November, 1907.

THE TRAVELERS INSURANCE COMPANY,
By S. C. DUNHAM, *President.*

Attest:
L. V. BURTON, *Secretary.* [SEAL.]

Signed, sealed and delivered in presence of
O. H. THRALL.
F. L. SMITH.

74 STATE OF CONNECTICUT,
County of Hartford, ss:

Be it remembered, that on this 2nd day of November, in the year 1907, before me the subscriber, a Notary Public in and for said County and State, duly commissioned and sworn, came S. C. Dunham, to me personally well known who, being by me first duly sworn, said that he resides in the City of Hartford, in the County of Hartford, Connecticut, in the county aforesaid; that he is the president of the Travelers Insurance Company of Hartford, Connecticut, the corporation described in and which executed the foregoing instrument; that he knew the corporate seal of said corporation; that the seal affixed to the within instrument was such corporate seal; that it was affixed thereto in behalf of said corporation, and by order of the Board of Directors thereof; that he signed his name thereto in like behalf and by like order as President thereof. And the said S. C. Dunham acknowledged said instrument to be the free and voluntary act and deed of the said The Travelers Insurance Company for the consideration, uses and purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal on the day and date last above given.

[SEAL.] OLIVER H. THRALL,
Notary Public.

My commission expires Feby. 1, 1909.

Endorsed: Filed at Duncan, Nov. 12, 1907, at 3 P. M. J. N. Jackson, Ex officio Recorder Dist. 29, I. T. $1.25.

75 (Also attached to the Agreed Statement of Facts appears the following Journal Entry:)

61st Day Mch., 1906, Term, Sat., June 30th, 1906.

Ex Parte APPOINTMENT OF J. N. JACKSON, Deputy Clerk, at Duncan, Ind. Ter.

Order Appointing.

On this the 30th day of June, 1906, comes into open Court C. M. Campbell, Clerk of the United States Court, for the Southern District Indian Territory, and makes known to the Court that he has

this day appointed J. N. Jackson his true and lawful deputy Clerk to be located at Duncan, in the said Southern District Indian Territory, the said appointment to take effect on the morning of the first day of July, 1906, and the court being well and sufficiently advised in the premises, it is hereby ordered that said appointment be and the same is in all things ratified and confirmed.

HOSEA TOWNSEND, *Judge.*

Ex Parte J. N. JACKSON.

Oath.

I, J. N. Jackson, being appointed a deputy clerk of the United States Court, Southern District, Ind. Ter., to be located at Duncan, Ind. Ter., do solemnly swear that I will truly and faithfully enter and record all the orders, decrees & Judgments and proceed-
76 ings of the said court, and that I will faithfully and impartially discharge and perform all the duties of my said office according to the best of my abilities and understanding, so help me God.

J. N. JACKSON.

Subscribed and sworn to before me this 30 day of June, 1906.

N. H. McCOY,
Notary Public, So. Dist. I. T.

I, J. N. Jackson, do solemnly swear that I will support and defend the constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same, that I take this obligation freely, without any mental reservations or purpose of evasion, that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.

J. N. JACKSON.

Subscribed and sworn to before me this the 30th day of June, 1906.

N. H. McCOY,
Notary Public, So. Dist. Ind. Ter.

The above and foregoing was all the evidence offered and all the evidence introduced at the trial of said cause.
77 And the Court, after hearing said Agreed Statement of Facts, and the Argument of counsel for plaintiff and defendants, and being well and sufficiently advised in the premises, found that the plaintiff take nothing by reason of his action, and that the defendants recover of and from the plaintiff all their costs expended herein.

The Journal Entry of the Judgment of the Court appears in the words and figures following, to-wit:

78 In the District Court of Carter County, Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

—.

JAMES O. GALLOWAY et al., Defendants.

Judgment.

On this the 8th day of May, 1912, this matter came on for hearing and upon the defendants, James O. Galloway, Winfield S. Pressgroves, the Travelers Insurance Company, and Atkinson, Warren & Henley, withdrawing their motions and demurrers heretofore filed herein, and filed answers, and this cause being heard by the Court upon an agreed statement of facts, the plaintiff being present in person, and the defendants being present by their counsel, Messrs. Stuart, Cruce & Gilbert, and H. A. Ledbetter, and the Court, after hearing argument and being well and sufficiently advised in the premises, finds the issues herein in favor of the defendants.

It is therefore ordered and adjudged and decreed by the Court that the plaintiff, James E. Whitehead, take nothing by his said action, and it is further ordered, adjudged and decreed by the Court that the defendant's title in and to the following described land, to-wit:

The east half of the east half of the southwest quarter, and the west half of the west half of the southeast quarter of section four (4), township two (2) south, range three (3) west, in Carter County, Oklahoma,

be and the same is hereby declared to be superior to that of the plaintiff, James E. Whitehead, and the title of the said defendants
79 be, and the same is hereby, quieted in them as against the said James E. Whitehead, and all persons claiming by, through or under him.

It is further ordered that the defendants recover of and from the plaintiff all their costs herein expended, for which let execution issue. To which said judgment, the plaintiff, in open Court, duly excepts.

S. H. RUSSELL,
Judge.

On the back of said Journal Entry appears the following endorsement: Filed in Open Court, May 8, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

80 And afterwards, to-wit, on the 8th day of May, 1912, the same being one of the regular judicial days of the May, 1912, term of said Court, and within three days after the Judgment rendered herein, the plaintiff, James E. Whitehead, filed in said

Court his motion for a new trial, which motion appears in the words and figures following, to-wit:

81 In the District Court of Carter County, Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

—.

JAMES O. GALLOWAY et al., Defendants.

Motion for New Trial.

Comes now the plaintiff and makes this, his motion for a new trial herein, and as grounds therefor, states the following:

First. That the decision of the Court is not sustained by sufficient evidence, and is contrary to law.

Second. That because of error of law occurring at the trial, and excepted to by the plaintiff.

Wherefore, plaintiff prays that he be granted a new trial.

J. E. WHITEHEAD,
Attorney for Plaintiff.

On the back of said motion appears the following endorsement: Filed in Open Court, May 8, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

82 And afterwards, to-wit, on the 8th day of May, 1912, the same being one of the regular judicial days of the May, 1912, Term of said Court, this cause came on for hearing on the motion of the plaintiff for a new trial herein, and the Court, after hearing said motion and the argument of counsel, and being well and sufficiently advised in the premises, overrules said motion, to which ruling and action of the Court, the plaintiff in open Court duly excepted.

Thereupon the Court allowed the plaintiff ninety days in which to prepare and serve case-made, and the defendants ten days to suggest amendments, the case-made to be signed and settled upon five days' written notice thereafter by either party.

The Journal Entry of the Order overruling plaintiff's motion for a new trial, and granting time in which to prepare and serve case-made appears in the following words and figures, to-wit:

83 In the District Court of Carter County, Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY et al., Defendants.

Order Overruling Motion for New Trial.

Now on this the 8th day of May, 1912, the same being one of the regular judicial days of the May term of this Court, comes on for hearing the motion of the plaintiff for a new trial, and the Court, after hearing said motion, and being well and sufficiently advised in the premises, overrules said motion, to which action of the Court in so overruling said motion for a new trial, plaintiff in open Court excepts.

Thereupon, for good cause shown to the Court, the plaintiff is allowed ninety days from and after this date to make and serve case made. Defendants are allowed ten days after the service of said case made in which to file suggestions of amendment, and the case made to be settled and signed by the Court upon five days' written notice by either party.

S. H. RUSSELL,
Judge.

On the back of said Journal Entry appears the following endorsement: Filed in Open Court, May 8, 1912. S. F. Haynie, Clerk District Court,, Carter County, Oklahoma.

84 The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made and all rulings and orders made herein, all exceptions taken by the plaintiff to such rulings and orders; all the evidence offered and introduced upon the trial of the cause, and all exceptions taken by the plaintiff to the admission or exclusion of such evidence; all instructions and declarations of law given by the Court and exceptions by the plaintiff thereto; all instructions or declarations of law asked by the plaintiff and refused by the court and exceptions of plaintiff thereto; the judgment of the court and the exceptions of the plaintiff thereof, and the same is a true and correct statement, and a complete transcript of all the pleadings, motions, findings, evidence, judgments and all proceedings in said cause.

85 In the District Court of Carter County, State of Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESGROVE, THE TRAVELERS Insurance Company, and the Atkinson, Warren & Henley Company, Defendants.

To James O. Galloway, or Stuart, Cruce & Gilbert, his attorneys of record, and Winfield S. Pressgrove, or H. A. Ledbetter, his attorney of record, and The Travelers Insurance Company and the Atkinson, Warren & Henley Company, or Shartel, Keaton & Wells, and H. A. Ledbetter, their attorneys of record:

The above and foregoing case-made is hereby tendered to and served upon you and each of you as a true and correct case-made in the above entitled cause and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgment and proceedings in the above entitled cause.

J. E. WHITEHEAD,
Attorney for Plaintiff.

Acknowledgment.

We hereby acknowledge due, legal and timely service of the above and foregoing case-made, this the 23rd day of May, 1912.

(Signed) STUART, CRUCE & GILBERT,
Attorneys for James O. Galloway.
(Signed) H. A. LEDBETTER,
Attorney for Winfield S. Pressgrove.
SHARTEL, KEATON & WELLS &
H. A. LEDBETTER,
Attorneys for The Travelers Insurance Company and The Atkinson, Warren & Henley Co.

86 In the District Court of Carter County, Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY et al., Defendants.

We, the undersigned, attorneys of record for the defendants in the above entitled cause, do hereby waive notice to us of the time and

place of the presentation of the above and foregoing case-made to the judge of said district court before whom said cause was tried, for settlement and signing, and hereby agree that said case-made may be presented to said judge for settlement and signing, and be settled, signed and allowed by said judge at any time when it may suit his convenience to do so.

We hereby further waive the issuance of a summons in error herein and hereby enter our appearance in said cause in the Supreme Court of the State of Oklahoma.

(Signed) STUART, CRUCE & GILBERT,
Attorneys for James O. Galloway.

" H. A. LEDBETTER,
Attorney for Winfield S. Pressgrove.

" SHARTEL, KEATON & WELLS &
H. A. LEDBETTER,
Attorneys for The Travelers Insurance Company and The Atkinson, Warren & Henley Co.

87 . In the District Court of Carter County, Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY et al., Defendants.

Be it remembered, that on this 12th day of June, 1912, at the court house in the city of Ardmore, in the county of Carter and state of Oklahoma, the above and foregoing case-made was presented to me, Stillwell H. Russell, Judge of the District Court of said County, before whom said cause was tried, to be settled and signed as the original case-made herein, as required by law by the parties to said cause; and it appearing to me that said case-made has been duly made and served upon the plaintiffs within the time fixed by the order of this Court, and in the time and in the manner and form provided by law; that said plaintiff is present by James E. Whitehead, and said defendants are present by Stuart, Cruce & Gilbert and H. A. Ledbetter and Shartel, Keaton & Wells, their attorneys of record, and no amendments having been suggested by the defendants within the time allowed by the order of this court, and the court being fully advised in the premises, and said case-made having been examined by me, is true and correct and contains a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in said cause, I hereby allow, certify and sign and settle the same as the true and correct case-made in said cause and hereby order that the clerk of said
88 court attest the same with his name and the seal of said court, and file the same of record as provided by law.

Witness my hand, this 12th day of June, 1912.

S. H. RUSSELL,
Judge of the District Court
of Carter County, Oklahoma.

Attest:
[SEAL.] S. F. HAYNIE,
Clerk of the District Court
of Carter County, Oklahoma.

STATE OF OKLAHOMA,
County of Carter:

I, S. F. Haynie, Clerk of the District Court of Carter County, Oklahoma, hereby certify that the above and foregoing is a true and correct copy of the case-made in the case of James E. Whitehead vs. James O. Galloway, et al., pending in the District Court of Carter County, Oklahoma, as the same appears of record in my office at Ardmore, Okla.

Done at Ardmore, Okla., this 12th day of June, 1912.
[SEAL.]
S. F. HAYNIE,
Clerk Dist. Court, Carter Co., Okla.

89 In the District Court of Carter County, Oklahoma.

No. 1095.

JAMES E. WHITEHEAD, Plaintiff,

vs.

JAMES O. GALLOWAY et al., Defendants.

Certificate of Clerk.

STATE OF OKLAHOMA,
Carter County, ss:

I, S. F. Haynie, Clerk of the District Court in and for Carter County, Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of the case-made and of the petition, answer, and other pleadings, of the agreed statement of facts, and of all judgments, orders and decrees of the court contained in and upon file in my office in cause No. 1095, wherein James E. Whitehead is plaintiff, and James O. Galloway, Winfield S. Pressgrove, The Travellers Insurance Company, and the Atkinson, Warren & Henley Company, a co-partnership, are defendants, as the same appear upon file in my office.

In testimony whereof I have hereunto set my hand and the seal of said court on this 12 day of June, 1912.
[SEAL.]
S. F. HAYNIE,
Clerk of the District Court
of Carter County, Oklahoma.

Filed June 12, 1912, S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

90 Thereafter, to-wit, on July 27th, 1915, at the July 1915 term thereof, the following proceedings were had and done in the Supreme Court of Oklahoma:

No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

J. O. GALLOWAY et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment appealed from herein should be affirmed. Opinion by Wilson, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

91 In the Supreme Court of the State of Oklahoma.

No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELERS Insurance Company and the Atkinson, Warren & Hensley Company, a Co-partnership, Defendants in Error.

Petition for Rehearing.

Now comes the Plaintiff in Error, James E. Whitehead, and prays the Court to grant him a rehearing in this cause and for grounds of said motion states:

That the Court erred in its decision in holding that the Act of Congress, approved June 21, 1906, did ipso facto establish the Twenty-ninth (29th), or Duncan Recording District, and set the wheels of government in motion in that district without any action upon the part of the Judge, Clerk or Recorder, or other officer, in organizing the same, and erred in holding that the passage of the Act of Congress and the approval of the same by the President in far away Washington created, established and organized the recording district and that no act was necessary on the part of any officer of the United States to put the wheels of government in motion.

That at the time of the taking of the deed from Wilburn Adams to Plaintiff in Error, to-wit: June 27, 1906, and the recording thereof

upon June 28, 1906, the Indian Territory was under the direct government of the United States, was controlled by the Constitution of the United States, and Congress was the sole Legislative Body. The Plaintiff in Error is a citizen of the United States, possessed of all the rights granted to him by the Constitution and laws of the
92 United States, and under the laws of the United States Plaintiff in Error had a vested right to acquire this property, and did acquire it by purchase from the then owner, Wilburn Adams. The laws of the United States (Act of March 1, 1895, 28 Stat. at Large, 693; 3 Fed. St. Ann. 414) specified the manner and means of registering or recording this deed. The territory, a part of which was embraced in this deed, was defined by this Act of Congress to be located in the Twentieth (20th) Recording District, and the place of recording specified to be at Ryan. The Plaintiff in Error complied with this Federal Recording Act, and the moment he took his deed and recorded it under this Act of Congress at Ryan his rights became vested under the Constitution and laws of the United States, and Congress did not intend, and had not the power to disturb these vested rights by the Act of June 21, 1906, creating the Duncan Recording District; That Congress never intended that said Act of June 21, 1906, should take effect until the said Recording District was organized by the appointment of a Recorder; that Congress had not the power to pass legislation which would compel an impossibility to be performed by the Plaintiff in Error; that Congress had not the power to pass an Act that would require the Plaintiff in Error to file his deed for record at Duncan, and then provide no officer with whom to file it, or no place to file the same and no book in which to record the same; That to pass such an Act with such a contemplation would violate the vested rights of this Plaintiff in Error under the Constitution and laws of the United States and would be void; that such a construction would take the property of Plaintiff in Error without due process of law and violate his constitutional rights; that Congress did not possess the power to require Plaintiff in Error to file his deed for record at Duncan without first providing an officer to receive the same and a place where the same might be delivered for record; that the question involved in this case involves more than a mere construction of the Federal Statutes, to-wit: the Act of June 21, 1906, creating the Duncan Recording District, but involves the vested rights of this Plaintiff in Error under the Constitution and
93 laws of the United States.

That this Court in deciding this case misconstrued the Constitution and laws of the United States above referred to and erred in holding that the case of Lumpkin vs. Muncy, 17 S W. 732, and other cases cited by Plaintiff in Error, were not decisive of the question presented in this case.

And the Court also erred in holding that Congress intended by the Act of June 21, 1906, creating the Duncan Recording District, to ipso facto organize the district without providing an office, or officer to discharge the duties imposed under the law creating the said district, and that the Court erred in holding that Congress had the right and power to disturb the vested rights of Plaintiff in Error

so acquired by the taking and the recording of his deed at the only place where it was possible for him to record the same, and erred in holding that Congress required the Plaintiff in Error to do a thing which it was impossible for him to do; and imposed upon Plaintiff in Error a duty without providing the means and facilities which would make it possible for him to perform said duty.

Wherefore, Plaintiff in Error prays that a rehearing be granted in this cause, and that upon such rehearing the decision of the lower Court be reversed and judgment rendered in this court in favor of this Plaintiff in Error upon his petition in error, and upon the agreed statement of facts contained in the record, and for such other relief as the Court may deem meet and proper.

J. E. WHITEHEAD,
Plaintiff in Error.

Endorsed: No. 4214. James E. Whitehead v. James O. Galloway et al. Petition for re-hearing. Filed August 11th, 1915. William Franklin, clerk.

94 Thereafter, to-wit, on December 21st, 1915, at the October 1915 term thereof, the following proceedings were had and done in the Supreme Court of Oklahoma:

No. 4214.

J. E. WHITEHEAD et al.,

vs.

J. O. GALLOWAY et al.

And now this cause comes on for final decision and determination by the Court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment appealed from herein should be affirmed, and that the opinion heretofore filed in this case be withdrawn and this opinion substituted therefor. Opinion by Wilson, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

95 In the Supreme Court of the State of Oklahoma.

No. 4214.

JAMES E. WHITEHEAD, Plaintiff in Error,

vs.

JAMES O. GALLOWAY, WINFIELD S. PRESSGROVE, THE TRAVELERS Insurance Company, and The Atkinson, Warren & Hensley Company, a Co-partnership, Defendants in Error.

Second Petition for Rehearing to be Heard by the Supreme Court Proper.

Now comes the plaintiff in error, James E. Whitehead, and by leave of the court first had filed this his second petition for re-hearing before the Supreme Court proper, and prays the court to grant him a re-hearing in this cause and for grounds of said petition states:

That the Court erred in its decision in holding that the Act of Congress, approved June 21, 1906, did ipso facto establish the Twenty-ninth (29th) or Duncan Recording District of the Indian Territory, and set the wheels of government in motion in that district without any action upon the part of the Judge, Clerk or Recorder, or other officer, in organizing the said district, and erred in holding that the passage of the Act of Congress and the approval of the same by the President in far away Washington created, established and organized the recording district and that no act was necessary on the part of any officer of the United States to put the wheels of government in motion.

That at the time of the taking of the deed from Wilburn Adams to plaintiff in error, to-wit: June 27, 1906, and the recording thereof upon June 28, 1906, the Indian Territory was under the direct government of the United States, was controlled by the Constitution of the United States and Congress was the sole legislative
96 body. The Plaintiff in Error is a citizen of the United States, possessed of all the rights granted to him by the Constitution and laws of the United States, and under the laws of the United States Plaintiff in Error had a vested right to acquire this property, and did acquire it by purchase from the then owner, Wilburn Adams. The laws of the United States (Act of March 1, 1895, 28 Stat. at large, 693; 3 Fed. St. Ann. 414) specified the manner and means of registering or recording this deed. The territory, a part of which was embraced in this deed, was defined by this Act of Congress to be located in the Twentieth (20th) Recording District, and the place of recording specified to be at Ryan. The Plaintiff in Error complied with this Federal Recording Act, and the moment he took his deed and recorded it under this Act of Congress at Ryan his rights became vested under the Constitution and laws of the United States, and Congress did not intend, and had not the power to disturb these vested rights by the Act of June 21, 1906, creating the Duncan Recording District; That Congress never in-

tended that said Act of June 21, 1906, should take effect until the said Recording District was organized by the appointment of a Recorder; that Congress had not the power to pass legislation which would compel an impossibility to be performed by the Plaintiff in Error; that Congress had not the power to pass an Act that would require the Plaintiff in Error to file his deed for record at Duncan, and then provide no officer with whom to file it, or no place to file the same and no book in which to record the same; that to pass such an Act with such a contemplation would violate the vested rights of this Plaintiff in Error under the Constitution and laws of the United States and would be void; that such a construction would take the property of Plaintiff in Error without due process of law and violate his constitutional rights; that Congress did not possess the power to require Plaintiff in Error to file his deed for record at Duncan without first providing an officer to receive the same and a place where the same might be delivered for record; that the question involved in this case involves more than a mere con-
97 struction of the Federal Statutes, to-wit: the Act of June 21, 1906, creating the Duncan Recording District, but involves the vested rights of this Plaintiff in Error under the Constitution and laws of the United States.

That this Court in deciding this case misconstrued the Constitution and laws of the United States above referred to and erred in holding that the case of Lumpkin vs. Muncy, 17 S. W., 732, and other cases cited by Plaintiff in Error, were not decisive of the question presented in this case.

And the Court also erred in holding that Congress intended by the Act of June 21, 1906, creating the Duncan Recording District, to ipso facto organize the district without providing an office, or officer to discharge the duties imposed under the law creating the said district, and that the Court erred in holding that Congress had the right and power to disturb the vested rights of Plaintiff in Error so acquired by the taking and the recording of his deed at the only place where it was possible for him to record the same, and erred in holding that Congress required the Plaintiff in Error to do a thing which it was impossible for him to do; and imposed upon Plaintiff in Error a duty without providing the means and facilities which would make it possible for him to perform said duty.

Wherefore, Plaintiff in Error prays that a rehearing be granted in this cause, and that upon such rehearing the decision of the lower Court be reversed and judgment rendered in this court in favor of this Plaintiff in Error upon his petition in error, and upon the agreed statement of facts contained in the record, and for such other relief as the Court may deem meet and proper.

JAMES E. WHITEHEAD,
Plaintiff in Error.

Endorsed: No. 4214. James E. Whitehead v. James O. Galloway, Et Al. Second Petition for Re-hearing before the Supreme Court proper. Filed May 4th, 1916. William Franklin, Clerk.

98 Thereafter, to-wit, on July 18th, 1916, at the July 1916 term thereof, the following proceedings were had and done in the Supreme Court of the State of Oklahoma.

No. 4214.

J. E. WHITEHEAD,

v.

J. O. GALLOWAY.

And now on this day it is ordered by the Court that the petition for rehearing in the above entitled and numbered cause, be, and the same is hereby denied.

99 UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, Wm. F. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 98 pages, numbered from 1 to 98, both inclusive, is a true, full and complete transcript of the record and all proceedings in the Supreme Court of the State of Oklahoma, in case No. 4214, James E. Whitehead, plaintiff in error, vs. James O. Galloway, Winfield S. Pressgrove, The Travelers Insurance Company and The Atkinson, Warren & Henley Company, a co-partnership, defendants in error, and also of the opinions of the court rendered therein, as the same now appear on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Oklahoma City, in the State of Oklahoma, on this 31st day of March, 1917.

[Seal Supreme Court State of Oklahoma.]

W. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.
By N. C. ORR, *Ass't.*

Endorsed on cover: File No. 25,939. Oklahoma Supreme Court. Term No. 184. James E. Whitehead, plaintiff in error, vs. James O. Galloway, Winfield S. Pressgrove, The Travelers Insurance Company, and The Atkinson, Warren & Henley Company. Filed May 5th, 1917. File No. 25,939.

7.

In the Supreme Court of the United States

OCTOBER 1917 TERM

James E. Whitehead,
Plaintiff in Error,

vs.

James O. Galloway, Winfield S. Pressgrove, The Travellers Insurance Company, and the Atkinson, Warren & Henley Company, a Co-Partnership,
Defendants in Error.

No. ~~408~~ 184

BRIEF OF PLAINTIFF IN ERROR

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STATUTES CITED.

Act of Congress June 21, 1906, 34 Stat. L. 342; 1909 Supp. Fed. Ann. 214.

Act of Congress Fed. 19, 1903, 32 Stat. L. 841; 10 Fed. Stat. Ann. 130.

Act of Congress May 2, 1890, Chap. 182m, 26 Stat. L. 96; Fed. Stat. Ann. 412.

Act of Congress March 1, 1895, 28 Stat. L. 693; 3 Fed. Stat. Ann. 421.

Act of Congress April 21, 1904, 10 Fed. Stat. 137, Sec. 24.

Act of Congress March 3, 1905, 10 Fed. Stat. Ann. 137, Sec. 1.

CASES CITED.

Keys & Company vs. First National Bank of Vinita, 104 Pac. 346, 229 U. S. 179.
McKissick vs. Colquhoun, 18 Tex. 141.
Hayden vs. Nutt, 4 La. Ann. 65.
Chambers vs. Haney, 45 La. Ann. 447, 12 So. 621.
Smith vs. Anderson, 21 N. W. 841.
Hill vs. Saunders, 4 Rich. Law. 521.
Broussard vs. Dull, 21 S. W. 937.
Lumpkin vs. Muncey, 17 S. W. 732.
O'Shea vs. Twohig, 9 Tex. 336.
Clark vs. Goss, 12 Tex. 396.
Runge vs. Wyatt, 25 Tex. Supp. 292.
Linn vs. Scott, 3 Tex. R. 67.
Peacock vs. Hammond, 6 Tex. Rep. 544.
21 N. W. Rep. 841.
12 S. W. Rep. 229.
62 American Dec. 531, 18 Tex. 148.
55 American Dec. 696, 1 Ct. of App. 225 (Tex.).
16 Century Digest (Deeds) 224.
13 Cyc. 598 (3).
21 S. W. Rep. 937 and 187.
69 Tex. 177, 7 S. W. Rep. 54.
41 Tex. 591.
Astor vs. Wells, 4 Wheat. 466, 4 L. Ed. 616.
Green vs. Green, 103 Cal. 108, 37 Pac. 188.
Garrison vs. Hayden, 19 Am. Dec. 70.

In the Supreme Court of the United States

OCTOBER 1917 TERM

James E. Whitehead,
Plaintiff in Error,

vs.

James O. Galloway, Winfield S. Pressgrove, The Travellers Insurance Company, and the Atkinson, Warren & Henley Company, a Co-Partnership,
Defendants in Error.

No. 496

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF FACTS

Plaintiff in error, James E. Whitehead, filed this suit in the District Court of Carter County, Oklahoma, *in ejectment* and to quiet title against defendants in error, James O. Galloway, Winfield

S. Pressgrove, The Travellers Insurance Company and the Atkinson, Warren & Henley Company, a co-partnership. The cause was tried and judgment rendered in favor of defendants in error and plaintiff in error appealed the case to the Supreme Court of the State of Oklahoma, where Commissioner Wilson rendered the opinion of the court affirming said cause (R.. 2.. for opinion). Upon petition for rehearing being filed the opinion was modified, still affirming the judgment of the court below (for modified opinion see R. 8..). Plaintiff in error now brings the case to this court for decision. The facts are as follows:

Upon June 27, 1906, one Wilburn Adams, having land that he could legally convey, sold the same to the plaintiff, James E. Whitehead, by warranty deed, which deed was field for record upon June 28, 1906, in the office of the Recorder for the 20th Recording District, at Ryan, then Indian Territory, and duly recorded.

Upon the 21st day of June, 1906, the President of the United States approved an Act of Congress known as the Act creating the Duncan, Wilburton, Tulsa and Bartlesville Recording Districts. Upon June 30, 1906, C. M. Campbell, Clerk of the

United States Court for the Southern District of the Indian Territory, appointed C. N. Jackson as Deputy Clerk and *ex-officio* Recorder for the Duncan District. Upon the said 30th day of June, 1906, the appointment of C. N. Jackson was approved by the court at Ardmore, his bond made and approved, and he took the oath of office that day.

C. N. Jackson, Deputy Clerk and *ex-officio* Recorder, arrived at Duncan and opened his office on the 7th day of July, 1906, and the first entries were made in his books on the said 7th day of July, 1906.

Upon November 16, 1906, the said Wilburn Adams executed another deed to the same lands, seeking to convey the same to defendant, James O. Galloway, which said deed was recorded on November 22, 1906, in the office of the Recorder of the Duncan Recording District.

Shortly after the defendant, James O. Galloway, received his deed he took possession of the said lands and sold the same to defendant, Winfield S. Pressgrove, and, in turn, defendant, Pressgrove, executed mortgages upon the said lands to defendants, The Travellers Insurance Company

and the Atkinson, Warren & Henley Company.

Plaintiff by his suit sought to eject these defendants from the said land and to cancel their deeds and mortgages as clouds upon his title.

This case hinges upon the one proposition: *When did the act creating the Duncan Recording District go into effect*—whether *ipso facto*, the moment it was signed by the President, or did it go into effect when the Recording District was duly organized by the appointment of the proper officer and adequate facilities provided for the recording of instruments?

If the Act went into effect the moment it was signed by the President and if, thereafter, all instruments were required to be recorded at Duncan, regardless of the fact that no office was open and no one was there to receive such instruments, in such event, defendants are entitled to judgment, as was given to them by the court below. If, on the other hand, the Recording District was merely created by the Act of Congress and became effective upon the organization of this district and upon the appointment of proper officers to administer the laws, then plaintiff was entitled to judgment below and is entitled to reversal and judgment in

this court. This case was decided by Commissioner Wilson, first, October, 1915; and, second, upon rehearing, December 21, 1915. The case involves a construction of the Act of Congress approved June 21, 1906 (34 Stat. at Large 342) creating several recording districts in the Indian Territory, among which was the Duncan District. A Federal question is therefore involved, to-wit: The construction of this Act of Congress, which Act has not heretofore been construed by the United States Supreme Court.

ASSIGNMENTS OF ERROR

(1) The District Court of Carter County, Oklahoma, erred in rendering judgment for defendants in error upon the trial of said cause.

(2) The District Court of Carter County, Oklahoma, erred in overruling the motion for a new trial filed in the said cause by the plaintiff in error.

(3) The Supreme Court of the State of Oklahoma erred in its decision affirming the judgment of the District Court of Carter County, Oklahoma.

ARGUMENT.

This case was tried in the lower court upon an agreed statement of facts (see Record, pages 17 to 21), and there are no disputed facts. The sole question is, did Congress intend by its Act to create and *ipso facto* put into active operation the Duncan Recording District prior to the time when a Deputy Clerk and *ex-officio* Recorder could legally be appointed, could qualify, could secure his quarters and his records and open his office for the transaction of business. In other words, did Congress intend that this Act should be in complete operation from and after its approval upon June 21, 1906, or did it intend that it should go into effect when the office was actually opened? The gist of the matter is this: Where was the proper place to record instruments of this kind between the dates of June 21, 1906, and July 7, 1906? Plaintiff took his deed between these two dates—his deed was executed and delivered on June 27, 1906, and recorded June 28, 1906; two days before the clerk and ex-officio Recorder was appointed, upon June 30, 1906, and opened his office on July 7, 1906.

Plaintiff insists that when he recorded his

deed in the mother district, the Ryan Recording District, upon June 28, 1906, he complied with the law in force at the time and he did all that the law required him to do. Plaintiff insists that no person could be an innocent purchaser of said lands for value without investigating the records of the Ryan Recording District at Ryan up to and including the 7th day of July, 1906.

It was impossible for instruments to be recorded at Duncan, in the 29th Recording District, until Deputy Clerk and *ex-officio* Recorder had been appointed. The Act did not appoint a Recorder for the district, but the Act did provide that "the laws regulating the holding of court in the Indian Territory should be applicable to said district so created at Duncan." The provision of this Act applicable to this case is as follows:

> "(Terms of the court at town of Wilburton—Recording District No. 30 established—Recording District No. 27 established—Court at Bartlesville—Recording District No. 28 established—Court at Tulsa—Attached to Western District—Court at Duncan—Recording District No. 29 established—Court at Duncan). That in addition to the places now provided by law for holding courts in the central judicial district of the Indian Territory, terms of the district court of the central district shall hereafter be held at the town of Wilburton, and

the United States judge of said central district is hereby authorized to establish by metes and bounds a recording district for said court to be known as recording district numbered thirty. That all laws regulating the holding of courts in Indian Territory shall be applicable to the court hereby created at the town of Wilberton. * * * That in addition to the places now provided by law for holding courts in the southern judicial district of Indian Territory courts shall be held in the town of Duncan, and all laws regulating the holding of the courts in the Indian Territory shall be applicable to the said court hereby created in the said town of Duncan. That the territory next herein described shall be known as Recording District numbered twenty-nine, beginning at a point where township line between townships two and three north reaches the east boundary line of Oklahoma Territory; thence east on said township line twenty-four miles to where it intersects with range line three and four west; thence south on said range line three and four west; thence south on said range line twelve miles to where it intersects the base line between townships one north and one south; thence east along said base line six miles to the range line between ranges two and three west; thence south twelve miles along said range line to the township line between townships two and three south; thence west thirty miles along said township line to where it intersects with the east line of Oklahoma Territory; thence north along said line twenty-four miles to the place of beginning; and the place of recording and holding court in said district shall be Duncan." (34th Stat. L. 342; 1909 Supp. Fed. Ann. 214).

Commissioner Wilson, in his first opinion, held that the Act of Congress creating the Duncan Recording District went into effect *ipso facto* the moment the President signed the bill in Washington, regardless of the fact that no office was open for the recording of deeds in Duncan for 18 days thereafter. He sought to justify this holding by the statement that the district was organized the moment the Act was approved by the President, because it had a *judge*, a *clerk* and a *marshal* already acting for the whole Southern District of the Indian Territory, which included the territory embraced in the newly created Duncan Recording District. Commissioner Wilson, in his first opinion, failed to observe the duties of the officers then existing—judge, clerk and marshal. He failed to grasp the idea that neither the *judge, clerk* nor *marshal* could record a deed. The Act of Congress gave the judge no power to record a deed, gave the clerk none and gave the marshal none, hence these officers lacked power to record a deed. He failed to observe the fact that the clerk of the Southern District of the Indian Territory was not a recorder for the district, but that the recorder was a separate office created, and which office was held by the same person holding

the deputy clerkship. This person appointed as deputy clerk became also recorder. He held two offices, performed two duties and gave two bonds. He was accountable as *clerk* to the *judcial department* of the government, and was accountable as *recorder* to the *executive department* of the government. Hence, no one could record a deed at Duncan until the 7th day of July, 1906, when C. N. Jackson was appointed and qualified as *deputy clerk* and *recorder*, upon which date he gave two bonds, the one as *deputy clerk*, the other as *recorder*. We filed a petition for rehearing and a brief which pointed out to Commissioner Wilson the error of his way. In his second opinion he says: "While we are satisfied that our conclusions reached in the former opinion were correct, yet the brief in support of the motion for a rehearing convinces us that our reasoning was, in part, faulty, and we therefore withdraw that opinion, and submit this one in lieu thereof."

The new opinion also holds that the Act of Congress went into effect *ipso facto* the moment the President signed the bill, notwithstanding the office was not opened or a recorder appointed for eighteen days thereafter. The following quotation from the opinion will be of interest: "The

very instant the 29th Recording District was created by Act of Congress it was, by operation of law, supplied with an officer, the clerk of the court of the Southern Judicial District of the United States Court for the Indian Territory, and the act creating it designated the place at which the duties of the recorder should be performed, to-wit, at Duncan, and deeds to land therein situated which were executed after its creation should have been recorded at Duncan because the Federal statutes prescribing where such deed should be recorded, expressly said so."

From the above quotation it is apparent that Commissioner Wilson believed that the office of recorder and of clerk were the same, and believed that C. M. Campbell, the clerk for the whole Southern District, had authority to go to Duncan, receive and record plaintiff's deed. We submit that, under the Acts of Congress, he had no such power, but only had power to appoint a deputy clerk for the Duncan court, and that the Act of Congress made this deputy clerk also the recorder. Mr. Campbell, the clerk, could not record a deed either before or after the appointment of C. N. Jackson as deputy, as the Act of Congress makes the deputy clerk, and not the clerk, the recorder.

The Act of February 19, 1903, *supra* (10 Fed. St. Ann. 130), reads as follows:

> "(Recording of Deeds, etc.—Laws of Arkansas extended—Clerks *ex-officio* Recorders). That chapter twenty-seven of the Digest of the Statutes of Arkansas, known as Mansfield's Digest of Eighteen Hundred and Eighty-four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of Congress; provided, that the clerk or deputy clerk of the United States Court of each of the courts of said territory shall be *ex-officio* recorder for his district and perform the duties required of recorders in the chapter aforesaid, and use the seal of such court in cases requiring a seal, and keep the records of such office of said clerk or deputy clerk" (32 Stat. L. 841).

Hence Mr. Campbell, the clerk, was the recorder for the Ardmore division only, and C. N. Jackson was the recorder for the Duncan division, and likewise the deputy clerk at Ryan was the recorded for the Ryan district, the deputy clerk at Pauls Valley the recorder for the Pauls Valley district, and the deputy clerk at Purcell recorder for the Purcell district. They were not deputy recorders, but they were recorders, deputy clerks and recorders.

The following quotation from Commissioner Wilson's opinion will also be of interest:

"The Act of Congress approved June 21, 1906, defined the boundaries of Recording District No. 29, and no further organization thereof was necessary."

Commissioner Wilson assigns the fact that the Act prescribed the boundaries of the district as evidence of the fact that the district was organized and nothing further to be done except to begin recording deeds whether the office was open or a recorder appointed or not. If he had read this Act in full, and observed the provisions of the Act applicable to the Wilburton recording district, he would have observed that Congress provided that the judge should, by decree, prescribe the boundaries of the district (1909 Supplemental Fed. Stat. Ann. 214), and, evidently, until this was done, it could not be known what territory would compose the Wilburton district. It cannot be urged that Congress intended that the Duncan district should be *ipso facto* created the moment the bill was approved, and the Wilburton district, included in the same bill, left for future organization. We think that Congress intended that each one of the districts created, Duncan, Wilburton, Bartlesville and Tulsa, should be upon the same basis created, but not organized until such time as the officers

whose duty it was to organize them completed this organization. In the Wilburton district, the metes and bounds had to be prescribed by decree and the recorder appointed. In the Duncan, Bartlesville and Tulsa districts a recorder had to be appointed, the metes and bounds being prescribed by the Act of Congress (34 Stat. at Large 342; 1909 Supplemental Fed. Stat. Ann. 214).

Commissioner Wilson then concludes his opinion with the following:

> "We conclude that the Act of Congress approved June 21, 1906, *ipso facto* created and established the 29th recording district of the Southern Judicial District of the United States Court for the Indian Territory; that instruments conveying the title to land within the boundaries of that district executed after that date should have been filed in the office of the recorder at Duncan, and that the act of the plaintiff in error in filing his deed to the land in controversy in the office of the recorder at Ryan in the 20th recording district was not such an act as conveyed to or charged the defendants in error with notice of plaintiff in error's deed to the land in controversy."

We insist that his opinion is erroneous, and that Congress never intended to suspend the wheels of the government in this Duncan recording district for this eighteen days, but that it intended

that instruments should be recorded in the mother district until such time as the Duncan recording district should be organized by the appointment of a clerk and recorder, the buying of a seal and records, and the opening of an office. Congress never intended to require an impossibility, or to require a thing to be done without providing adequate means and facilities for doing the thing required.

It is absurd and foolish to say that plaintiff must have recorded his deed at Duncan during these eighteen days, when no office was open, no clerk appointed, and no place where he could file his deed for record. If he tendered his deed to the postmaster, the postmaster, no doubt, would have refused to accept it; if he had tendered his deed to the mayor of Duncan, the mayor, no doubt, would have refused; if he had declared himself to be the recorder for the district and recorded his own deed in a book provided by himself he would have been arrested for usurpation of power and sent to the asylum as crazy. Hence, what could he do? There was but one sensible thing to do and that, to record his deed at the seat of government in the mother district, the place where he should have recorded it, if he had obtained it before the Act of

Congress was passed, which was at Ryan. He did record it at Ryan, and we insist that the recording of it was valid, and that the defendants were compelled to take notice of the Ryan records until the 7th day of July, 1906, when the Duncan district was actually opened, the clerk appointed and the records supplied. Furthermore, the provision was made by Congress to transfer all records from Ryan to Duncan which covered that territory (Chap. 707 of 32nd Stat. at Large 842, 10 Fed. Stat. Ann. 131), which statute has been construed by this Court and by the United States Supreme Court in case of *Keys & Company* v. *First National Bank*, 104 Pac. 346, 229 U. S. 179.

This Act of Congress, approved June 21, 1906, *supra*, makes provision for four new recording districts in the Indian Territory: One at Wilburton, one at Tulsa, one at Bartlesville and one at Duncan. It is fair to assume that if Congress intended that the Wilburton district should become effective only upon its organization, that it likewise intended that the other three should become effective upon their organization. The Act provides that the judge shall prescribe the metes and bounds of the Wilburton district, and the act itself prescribes the

metes and bounds of the other three districts. It was a physical impossibility for the Wilburton district to become effective the moment the President signed the bill, because its metes and bounds were not established, and no one could tell where the district was, or would be, hence the decree of the court must be had defining the metes and bounds. In all four of the districts a deputy clerk and recorder had to be appointed, an office opened and stationery, records and seal procured.

In the opinion of Commissioner Wilson, filed in this cause, it is very apparent that he has failed to distinguish the difference under the Acts of Congress between the *Clerk of the Southern District of the Indian Territory and recorders.* C. M. Campbell was appointed clerk of the Southern District of the Indian Territory under the Act of Congress approved March 1, 1895 (28 Stat. L. 693, 3 Fed. St. Ann. 421), which was long prior to any of the Acts of Congress creating recording districts.

Prior to the passage of these various recording acts, Campbell was the clerk and every other clerk under him was a deputy; he was *the clerk*, and all others acted in *his name*, as deputies un-

under him. In the passage subsequently of these various recording acts no duties were taken away from Campbell as clerk, and no duties were added to him as clerk, but a new, separate and independent office was created in, not the Southern District, but in each separate recording district, which office was known as *recorder*. The office of the recorder was created in each of the recording districts, each separate and independent of the other. Campbell was clerk of the whole southern district, but was *ex-officio* recorder only in the Ardmore recording district (10 Fed. Stat. Ann., page 137, Sec. 24), and he had no power or authority to record a deed in any other recording district except the Ardmore district.

When the Duncan recording district was created two things were done: (1) the Act provided that the United States Court then existing in the southern district should hold sessions at Duncan; (2) a new recording district was created with Duncan as the place of recording. Campbell was the clerk and could have gone to Duncan and issued summons, order of attachments, sworn witnesses and performed other court work, but could not have performed any of the duties of recorder,

since the Act of Congress created a recording district to be organized by the appointment of a *recorder*. Campbell could not have gone to Duncan and recorded a deed because he was recorder for the Ardmore district only, and he had no power whatever to record a deed, or to file a deed for record at Duncan, because the Act provided that when a deputy clerk was appointed for the court at Duncan he should be, under the Act, also *ex-officio* recorder. This was done for the doubtless purpose of eliminating expense, and because these deputy clerks had ample and sufficient time to perform the additional duties of recorder. Each of these *ex-officio* recorders were required to give bond, not to Mr. Campbell, but to the United States of America, for the faithful performance of his duties and for all moneys coming into his hands; each of these recorders was paid a salary of eighteen hundred dollars ($1,800.00) per year, not by Mr. Campbell, but out of the fees collected for recording, as compensation for his labors as *ex-officio* recorder; he was also paid the sum of twelve hundred dollars ($1,200.00) per annum as salary for his labors as deputy clerk under Mr. Campbell, which was paid by the disbursing clerk of the Department of Justice (10 Fed. Stat. Ann.

137, Sec. 24). He was holding two offices, one of deputy clerk and the other of recorder (not deputy recorder), and was drawing two separate salaries; therefore, an obvious distinction between the office of deputy clerk and of recorder.

Commissioner Wilson, in the opinion in this case, fails to discriminate between the terms "deputy clerk" and "recorder," as clearly appears from the following language quoted from the opinion:

> "At the time the congressional act creating the 29th recording district (34 Stat. at Large 342) was approved by the President the Southern Judicial District of the United States Court for the Indian Territory had been created and organized and had a judge, clerk and other officers of the court and had been subdivided into recording districts, of which the clerk of the court was *ex-officio* the recording officer."

Here his error occurs: The clerk of the court was not *ex-officio* the recording officer, but the deputy at Duncan, when appointed and qualified, became and was the recording officer. He was the *chief officer, not a deputy recorder, but the real recorder.* The clerk had no power over him. He signed court process thus: "C. M. Campbell, Clerk, by C. N. Jackson, Deputy Clerk." He signed all

recording certificates thus: "C. N. Jackson, *Ex-Officio* Recorder, District No. 29, Indian Territory."

The above is an erroneous construction, but if correct, plaintiff would be entitled to judgment. Why? Because if it be true, as stated by Commissioner Wilson, that the clerk (Mr. Campbell) was the *ex-officio* recorder for this Duncan division, then he was likewise the *ex-officio* recorder for the Ryan division, and plaintiff, in filing his deed with his deputy at Ryan was in law filing it with the clerk, the main and proper officer, and plaintiff had the right to expect that the clerk would record the deed in the proper division; and the error of the clerk in recording the deed at Ryan instead of Duncan would not be the fault nor neglect of plaintiff. The clerk was expected to do his duty.

It is true, as stated in Commissioner Wilson's opinion, that the southern district had a judge, clerk and other officers, but this had nothing whatever to do with the office of recorder for this Duncan district. The judge could doubtless have held court at Duncan on the day the Act was passed, or any other day thereafter; or the clerk, Mr.

Campbell, could doubtless have issued process, sworn witnesses and performed the functions of clerk, and doubtless any deputy of Mr. Campbell in the whole district could likewise have performed the function of clerk, but neither Campbell nor a general deputy could have recorded a deed. This territory had not, prior to the passage of this Act, comprised any part of the Ardmore recording district. in which Mr. Campbell was recorder, but it had comprised a portion of the Ryan district where Mr. E. L. Frimel was recorder. Therefore, if any officers had authority to record instruments at Duncan prior to the time a recorder was appointed for this district, it would be Mr. Frimel and not Mr. Campbell, but if the Act of Congress went into effect *ipso facto* the moment the President signed the bill, this would terminate Mr. Frimel's authority in that portion of the territory, as he was appointed for the Ryan district only, and could not act beyond his limits, and Mr. Campbell could not act beyond the limits of the Ardmore district, where he, by virtue of the Act, had been made recorder, then who could have received the deed from this plaintiff in error at Duncan? No human on earth until such time as recording district had been organized by the ap-

pointment of a stationary clerk at Duncan who would then, by virtue of the Act of Congress, become *ex-officio* recorder.

It is, therefore, very apparent that Commissioner Wilson, in writing the opinion in this case, failed to discriminate between the term "deputy clerk" and the term "recorder" or "*ex-officio* recorder." He has confused them into being synonymous, when, as a matter of fact, they are separate and independent terms, not synonymous in any sense of the word, and are separate and independent offices, the one to be filled by appointment of the clerk, the other appointed by the Act of Congress; the one an officer of the judicial department of the government, the other an officer of the executive department.

The converse of the statement of Commissioner Wilson, *supra*, is therefore true and that *at the time Congress passed the Act creating the recording district the machinery was not already in force by prior appointment of officers, judges, clerks et al.*, as stated in the opinion. No judge, clerk or marshal was required in a recording district, but instead a recorder was required and at the passage of this act it remained for the clerk

to designate his deputy clerk for this court district, or court work, and then the law named this same person as recorder. It was necessary to appoint this deputy clerk in order that the district might be organized. The Act required a special deputy clerk to be designated for the court work at this one particular place, and then another Act dealing with the subject of recording instruments provided that this deputy clerk so appointed should perform the other duties also. Mr. Campbell did not appoint this recorder; he had no authority to appoint the recorder, but he appointed his deputy clerk and the Act of Congress then appointed this same person holding the office of deputy clerk to the office of recorder.

Let us observe the wording of the various Acts of Congress creating recording districts in Indian Territory, from which this distinction will clearly appear.

County Defined.

The word "county" and the words "judicial division" were defined to mean one and the same thing by Congress in the Act of May 2, 1890 (Chap. 182, 26 St. L. 96, 3 Fed. St. Ann. 412), which reads as follows:

"Sec. 32 ('County' to mean 'Judicial Division'). That the word 'county,' as used in any of the laws of Arkansas which are put in force in the Indian Territory by the provisions of this Act, shall be construed to embrace the territory within the limits of a judicial division in said Indian Territory; and whenever in said laws of Arkansas the word 'county' is used, the words 'judicial division' may be substituted therefor in said Indian Territory, for the purposes of this Act (26 Stat. L. 96, 10 Fed. St. Ann. 412).

The Act of Congress approved March 1, 1895 (28 Stat. L. 693, 3 Fed. St. Ann. 421), first divided Indian Territory into districts. Prior to that time there was one clerk for the whole Indian Territory, known as "The Clerk of the United States Court in the Indian Territory." This Act of Congress cut the Indian Territory up into three districts, known as the Southern Central and Northern districts, which provided that the clerk of the United States Court in the Indian Territory should be clerk of the southern district, and that clerks should be appointed for the central and northern districts by the judges. This statute reads as follows:

"Sec. 3. (Clerks—Duties). That the clerk of the United States Court in the Indian Territory, now in office, shall be clerk of the south-

ern district, and the clerks of the central and northern districts shall be appointed by the respective judges thereof, and the clerk of each district shall reside and keep his office at one of the places of holding court in his district. He shall perform the same duties and be subject to the same liabilities as clerks of district courts of the United States, and, before entering upon his duties, he shall give bond in the sum of five thousand dollars, with two or more sureties, to be approved by the judge of the district, conditioned that he will faithfully discharge his duties as required by law. Each of said clerks shall appoint a deputy clerk for each court in his district where he himself does not reside."

(Observe here a deputy was required for each place of holding court; not general deputies, but stationary or local deputies.)

This same Act in the following section provided for deputies for these three clerks and fixed the salary of the deputy at twelve hundred dollars ($1,200.00) per year. This provision applicable to the deputy reads as follows:

"(Deputy—Approval of Deputies). Such deputy clerk shall keep his office and reside at the place for holding the court for which he is appointed and receive a salary of one thousand, two hundred dollars per annum; provided, that the appointment of such deputy shall be approved by the judge of the district and may be annulled by

said judge for cause, which shall be stated on the records of the court, and the clerk shall be responsible for the official acts and negligence of his deputies."

Observe here: (1) The deputy must be appointed for each place of holding court, a local deputy; (2) the clerk is made responsible for the acts of his deputies.

From the above it will be seen that C. N. Jackson, as such deputy clerk and *ex-officio* recorder, could not act and was not in fact clerk and recorder until his appointment was approved by the United States Court. This approval was granted upon June 30, 1906 (see agreed statement of facts, pp. 44 and 45 of Record).

Congress having seen fit to provide the manner of selecting these officers and having provided in the very act creating the Duncan district that all prior laws should be made applicable to this court and district, undoubtedly meant that the the Act should not become effective until the district could become organized in the manner provided by law for organizing it, to-wit, by the appointment of a deputy clerk who would thereby become by operation of the law also *ex-officio* recorder and the approval of such appointment by

the United States Court and by such deputy clerk and recorder qualifying in the manner provided by law.

An interesting provision is found in the Act of May 2nd, 1890. At that time the whole Indian Territory was in one district. It had one judge and one clerk. This clerk kept his office at Muskogee, but he had a deputy at McAlester and at Ardmore. This provision of the Act is as follows:

> "Sec. 38. (Marriages by Clerks of Courts). The clerk and deputy clerks of said United States Court shall have the power within their respective divisions to issue marriage licenses or certificates and to solemnize marriages. They shall keep copies of all marriage licenses or certificates issued by them, and a record book in which shall be recorded all licenses or certificates after the marriage has been solemnized, and all persons authorized by law to solemnize marriages shall return the license or certificate, after executing the same, to the clerk or deputy who issued it, together with his return thereon.
>
> "(Clerks to be Recorders of Deeds.) They shall also be *ex-officio* recorders within their respective divisions and, as such, they shall perform such duties as are required of recorders of deeds under the said laws of Arkansas and receive the fees and compensation therefor which are provided in said laws of Arkansas for like service" (26 Stat. at Large 98, 3 Fed. Stat. Ann. 414).

From the above provision, it will be seen that

the clerk and the deputy clerks were made *ex-officio* recorders for their respective divisions, and received all the fees. This remained the law until the Act of March 1st, 1895, *supra*, divided the Indian Territory into three judicial districts, provided for three judges and three clerks; and Mr. Campbell was then made the clerk of the southern district. Under the Act of March 1st, 1890, Mr. Campbell continued to act as *ex-officio* recorder for the southern district, which embraced the Chickasaw Nation and had only the one place of holding court—that at Ardmore. The history of this transaction was that Mr. Campbell became very rich in these fees, because he was recorder for his whole district, there being but one court in the southern district. Mr. Campbell continued to draw these fees until the passage of the Act of Feb. 19th, 1903, which was the general recording act, and which provided for 25 separate court divisions, the following of which were carved out of Mr. Campbell's southern district, to-wit: Ada, Pauls Valley, Purcell, Chickasha, Ryan, Ardmore and Tishomingo. This Act provided, as we have heretofore shown, for the deputy at each of these places, except Ardmore, to be the recorder; hence the history goes, which is known by persons famil-

iar with the situation, that Mr. Campbell's revenues were greatly reduced, having fees cut off amounting to about ten thousand dollars a year and being placed on a salary of $2,500.00 as recorder for the Ardmore division, his salary as clerk remaining the same.

In Black's Law Dictionary the term "*ex-officio*" is defined thus:

> "EX-OFFICIO. From office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers may be exercised by an officer which are not specifically conferred upon him, but are necessarily implied in his office; those are *ex-officio*. Thus a judge has *ex-officio* the powers of a conservator of the peace. Courts are bound to notice public statutes judicially and *ex-officio*."

Hence, it was the evident purpose of Congress to create a separate office of recorder, and to require the duties to be performed by the deputy clerks, who were given the double title of "deputy clerk" and "*ex-officio* recorder." From an inspection of any old deed recorded in any of these districts, it will be observed that the recorder's certificate is signed, not by Mr. Campbell, clerk, by the deputy clerk, but the certificate is signed in the name of the deputy clerk as the officer, and

over the title *ex-officio* recorder in and for some certain numbered district (see old deed with stamp attached to first petition for rehearing). The clerk, Mr. Campbell, had no supervision or control over these recorders. He had supervision and control over the same person as deputy clerk in all matters pertaining to court work, but in matters pertaining to the recorder's office Mr. Campbell, as the clerk, had no jurisdiction or supervision over the deputy as such recorder; neither had the recorder in, for instance, the Ryan recording district, any right or power to exercise the function in any other recording district, save and except the one in which he was appointed. Therefore, if the Act of Congress *ipso facto* created the Duncan recording district and the President by signing the bill touched the electric button that set the wheels of government in motion a thousand miles away, then Mr. Frimel, the recorder in the mother district, the Ryan district, had no power or authority to record a deed at Duncan, because that was out of the district for which he was appointed. Campbell had no authority to record an instrument at Duncan because he, as clerk, had no authority as a recorder, but under the act he was made *ex-officio* recorder for the Ardmore district only, just as

Frimel was for the Ryan district and as Jackson was for the Duncan district. Campbell, Frimel and Jackson were all on a par so far as the duties of recorder were concerned, neither had any power over the other, neither was superior to the other, neither could act out of his particular recording district. Each of these recorders, Campbell, Frimel and Jackson, as well as the others in the Indian Territory, accounted alike to the United States for the fees collected by them in excess of the amount allowed as salary for the recorder. If Frimel and Jackson had been deputy recorders under Campbell and he had been a general recorder, then Frimel and Jackson would have been compelled to account to Campbell for the fees and Campbell would have likewise been compelled to account to the government for fees collected from Frimel and Jackson. If Frimel or Jackson had defaulted in office would Campbell have been held responsible to the government for the defalcation? Certainly not. Since Frimel and Jackson had to account direct to the government for the fees and since they were not appointed recorder by Campbell, or under him, then Campbell would have been responsible to the government for this defalcation. Again, let us assume that Frimel or Jackson had

refused to receive a valuable mortgage for recording, or had received it, collected the fees and then destroyed the mortgage without having recorded it, and the mortgagee had lost the debt by reason thereof, who would be responsible to this mortgagee? Campbell would not have been responsible. He would interpose the defense that he did not appoint the defaulter as recorder and the defalcation was not in connection with the court work, that he did not default as deputy clerk, but defaulted as recorder; that he, Campbell, was not responsible for the acts of Jackson or Frimel as recorder, or as notary public, or as constable, or any other office that they might hold. That if the defalcation had been connected with the court work so that it was the deputy clerk defaulting, and not the recorder, then Campbell would be responsible. Thus, it is clear that Campbell could not be held for the defalcation of either Frimel or Jackson for destroying the mortgage.

The act of February 19, 1903, *supra*, reads as follows:

> "(Recording of deeds, etc. Laws of Arkansas extended. Clerks *ex-officio* recorders). That chapter twenty-seven of the Digest of the Statutes of Arkansas, was known as Mans-

field's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of Congress; provided, that the clerk or deputy clerk of the United States Court of each of the courts of said Territory shall be *ex-officio* recorder for his district and perform the duties required of recorders in the chapter aforesaid, and use the seal of such court in cases requiring a seal, and keep the records of such office of said clerk or deputy clerk" (32 Stat. L. 841, 10 Fed. Stat. Ann. 30).

It will be observed in the above quotation that the disjunctive "or" is used; that the clerk "or" deputy clerk shall be *ex-officio* recorder for his district and perform the duties of recorder and keep such office at the office of the said clerk "or" deputy clerk. If reference is had to the Ardmore recording district the clerk, Mr. Campbell, is made *ex-officio* recorder. If reference is had to the Ryan recording district, it is Frimel, the deputy clerk; if to the Duncan district, it is Jackson, the deputy clerk. The disjunctive "or" shows plainly that the law is making the appointment of the recorder by placing the burdens and responsibility upon the shoulders of the officers located at the court town in the district, whether they be clerk or deputy. Thus, Campbell is recorder in the Ardmore district

and has no power or authority over the recorder in any other district.

> "(Duties of clerks, fees for filing, etc.) It shall be the duty of each clerk or deputy clerk of such court to record in the books provided for his office all deeds, mortgages, deeds of trust, bonds, leases, covenants, defeasances, bills of sale and other instruments of writing of, or concerning lands, tenements, goods or chattels; and where such instruments are for a period of time limited on the face of the instrument they shall be filed and indexed, if desired by the holder thereof, and such filing for the period of twelve months from the filing thereof shall have the same effect in law as if recorded in length, the fees for filing, indexing and cross indexing such instruments shall be twenty-five cents, and for recording shall be as set forth in section thirty-two hundred and forty-three of Mansfield's Digest of eighteen hundred and eighty-four" (32 Stat. L. 842, 10 Fed. Stat. Ann. 131).

In this section the same disjunctive "or" is used, showing that Congress intended to impose the duties and responsibilities upon the person attending to court work at the particular place, whether he be clerk or deputy clerk.

> "(Compensation—Disposition of surplus fees.) That the said clerk or deputy clerk of such court shall receive as compensation as such *ex-offiio* recorder for his district all fees received by him for recording instruments provided in this act, amounting to one thousand

> eight hundred dollars per annum or less; and all fees so received by him as aforesaid amounting to more than the sum of one thousand eight hundred dollars per annum shall be accounted to the Department of Justice, to be applied to the permanent school fund of the district in which said court is located" (32 Stat. L. 824, 10 Fed. Stat. Ann. 131).

In this section it will be observed that the same disjunctive "or" is used, still carrying out the idea that Congress intended to impose the duties and responsibilities upon the officer in charge at the particular places regardless of the fact whether he be clerk or deputy clerk. From this section it will also be observed that upon February 19, 1903, the day this act passed, it was the intention of Congress to fix the salary of each recorder, whether he be clerk or whether he be deputy clerk, at eighteen hundred dollars ($1,800.00) per year, and it was provided that he retain the fees up to the amount of eighteen hundred dollars ($1,800.00) and that he should account to the Department of Justice for the excess, not to C. M. Campbell, clerk, but to the United States, thus showing conclusively that Congress recognized the recorder as a direct officer of the government and that he was expected to account direct to the government, and that the

clerk of the Southern District, Mr. Campbell, had no jurisdiction or control over him as recorder.

This act of Congress of February, 1903 (Chap. 707 of 32d Statutes at Large 842, 10 Federal Statutes Annotated 131), provided for the transfer of instruments which were recorded prior to the organization of this district. This statute reads as follows:

> "(Prior Records Transferred Without Cost.) Such instruments heretofore recorded with the clerk of any United States court in Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute."

This statute makes it incumbent upon the recorder to transfer these records and not upon this plaintiff. Therefore, the plaintiff had a right to rely upon his deed being transferred in accordance with the above statute by the recorder and was entitled to the presumption that it had been done. This statute has been construed by this Court in the case of *Keys & Company* v. *First National Bank of Vinita*, 104 Pac. 346, in which case it was held that it was incumbent upon the clerk to transfer these records, and that if the clerk fails to do

so, nevertheless the mortgage of plaintiff was good because he had complied with the law and had done all that the law required of him; therefore, we insist that when the plaintiff in this case recorded his deed at the proper place at the time of the recording thereof, that he did all that the law required of him and that the defendants could not be innocent purchasers without first examining the records of the Ryan district up to July 7, 1906, and when they saw that these records had not been transferred to the Duncan district, then the law charged them with the diligence of going to Ryan and there searching these records up to July 7th, when the Duncan district was legally organized and open for the filing of such instruments. It is interesting to observe that this section does not define who shall make this transfer of prior instruments to the indexes of the new district. In our case Campbell did not make this transfer. Why didn't he make it? Doubtless because of the fact that he was not the recorder at either Ryan or Duncan, and it was not his business to make this transfer. Frimel didn't make it. Why didn't he make it? Doubtless because of the fact that this was work to be done at Duncan and he had no power to make an entry upon the Duncan books.

These instruments were all recorded in the Ryan district. Frimel had no power or authority when he crossed the line of this district. Jackson didn't make this transfer. Why? We don't know. It would seem to be the duty of Jackson under these provisions to make these transfers. Jackson was not appointed and qualified until July 7, as shown by the agreed statement of facts, and he could not have made transfers prior to that time, and it appears further that he didn't make them after that time. But the point is evident here that there was no obligation upon Campbell to make them, because neither the Ryan district nor the Duncan district had ever been a part of his recording district. Because Jackson failed to do his duty in this regard plaintiff must not suffer thereby.

Keys & Co. v. *First National Bank*, 104 Pac. 348, 229 U. S. 179.

County Again Defined.

"(Word substitutions.) That wherever in said chapter the word 'county' occurs there shall be substituted therefor the word 'district,' and wherever the words 'State' or 'State of Arkansas' occur there shall be substituted therefor the words 'Indian Territory,' and wherever the words 'clerk' or 'recorder' occur there shall be substituted the words 'clerk or deputy clerk of the United States Court.'" (32 Stat. L. 842, 10 Fed. Stat. Ann. 131).

This provision again defines the term "county" and says that it is synonymous with the word "district." Now this act is dealing with what kind of districts, court districts or recording districts? It is dealing with recording districts wholly, providing for the recording of instruments, for the fees of the recorder, for transferring the indexes and in defining the boundaries of the recording districts. Therefore, it is evident that Congress inserted this definition of "county" and "districts" in the act for the purpose of definitely and specifically proclaiming each recording district to be in effect a county. "County" was defined by Congress in the act of May 2, 1890, *supra*. In that act Congress was dealing with court matters, creating court districts and appointing judges, court clerks, marshals, constables and commissioners. Therefore, for the purpose of that act the word "county" was declared to be synonymous with "judicial division," not "judicial district." Therefore, under that act the Southern District was composed of seven separate divisions, or counties, in each of which a United States court was held. If the above last quoted section (32 Stat. L. 842, act of February 19, 1903), had been intended to refer to court matters it would not have been needed, as

Congress had already, in the act of May 2, 1890 (26 Stat. L. 96), defined the term county when used in connection with court matters, hence it must evidently have been the purpose of Congress to redefine it in this last act as referring to and used in connection with recording instruments. In both sections it is clear that Congress intended to make these court divisions and the recording districts separate and independent counties.

> "(Places of recording.) All instruments of writing, the filing of which is provided for by law, shall be recorded or filed in the office of the clerk or deputy clerk at the place of holding court in the recording district where said property may be located, and which said recording districts are bounded as follows" (32 Stat. L. 842).

The above last quoted section again uses the disjunctive "or" distinguishing between clerk and deputy clerk relating to the duties as recorder.

Then following this Congress goes on and by metes and bounds defines twenty-five separate recording districts, in each of which the clerk of the main district appointed a deputy clerk in each separate division, and the act of Congress likewise appointed this deputy clerk *ex-officio* recorder. He drew a salary of $1,200.00 per annum from the

Federal Government as deputy clerk and he drew a salary of $1,800.00 from the fees collected as *ex-officio* recorder. He accounted to Mr. Campbell for all fees received by him as deputy clerk, and he accounted to the United States direct for all fees received by him as *ex-officio* recorder in excess of his $1,800.00.

It is interesting to note by what authority the clerk could appoint a deputy. A statute must authorize it or there can be no appointment. Hence Congress provided for it in the early act of May 2, 1890 (26 Stat. L. 94, 3 Fed. Stat. Ann. 404), which statute reads as follows:

> "(Deputy clerks.) And the clerk of said court shall appoint a deputy clerk in each of said divisions in which said clerk does not himself reside at the place in such division where the terms of said court are to be held. Such deputy clerk shall keep his office and reside at the place appointed for holding said court in the divisions of such residence, and shall keep the records of said court for such division, and in the absence of the clerk may exercise all the official powers of the clerk within the division for which he is appointed; provided, that the appointment of such deputies shall be approved by said United States Court in the Indian Territory, and may be annulled by said court at its pleasure, and the clerk shall be responsible for the official acts and negligence of his respective deputies."

In this it is compulsory that the deputy shall keep his office and reside at the place appointed for holding court in the division of such district, and shall keep the records of the court for such division. Here it appears that Congress as early as 1890 contemplated a separate county of each division, and contemplated a local deputy clerk, and not a floating deputy. Then later when the recorders were provided for, the local deputy, *not his chief*, was made also the recorder.

To show further that Congress at all times intended to recognize the deputy clerk as the recorder, and to require him to account direct for the fees in excess of his salary, we call the Court's attention to the Indian Appropriation Act of April 21, 1904 (10 Fed. Stat., page 137, Section 24), and as showing that Congress required the deputy clerk to report his fees direct to the department, and not to the clerk. We also cite the Indian Appropriation Bill adopted March 3, 1905 (10 Fed. Stat. Annotated, page 137, Section 1).

The act under construction, June 21, 1906 (34 Stat. L. 342, 1909 Sup. Fed. Stat. Ann. 214) provides for four new recording districts.

The Wilburton district, it was provided that

the judge should prescribe the metes and bounds by decree. Can it be contended that this district was *ipso facto* organized, and that a deed recorded in the mother district before the metes and bounds were established would not be a good recording? And is it not certain that Congress intended to establish a uniform system and to put this act in force when the same thing was done in all four of the districts that would make recording possible, to-wit, the appointment of the recorder and the opening of the office? Did a set of men as wise and smart as the Congres of the United States ever intentionally do a thing so foolish as to require such an impossibility of an humble citizen? Did these wise, capable and ingenious law-makers ever intend to stop the wheels of government at any spot in the United States? If the opinion of Commissioner Wilson is the law, then Congress did, and intentionally did, stop the wheels of government in the Duncan recording district from June 21, 1906, to July 7, 1906, and the citizen was at the mercy of unscrupulous grantors and likewise at the mercy of conniving, heartless and shifty grantees.

To uphold the opinion of Commissioner Wilson would mean nothing more or less than to take the

property of plaintiff without due process of law. He complied with the laws of the government as best he could; his rights were vested when he filed his deed at Ryan, and to take the property in this way means nothing short of want of due process, and violates the rights of plaintiff under the Constitution of the United States.

It cannot be said that the defendants in error are innocent purchasers when they were so negligent as to buy this land with a gap of sixteen days out of their abstract. The records show that the first entry upon the Duncan books was made July 7. They knew the act passed June 21. This alone was sufficient to put them upon inquiry and to cause them to look at Ryan for records for the missing sixteen days.

The following quotation is from the opinion in the case of *McKissick* v. *Colquhoun*, 18 Texas Reports 154, and we think fairly states the law upon this point:

> "The fourth charge given was to the effect that it was not necessary that a deed properly recorded in the county in which the land lies, should be again recorded if the territory be afterwards attached to another county. We are not apprised of any statute which would require

an owner of land, having his deed properly registered in the county where the land lies, to have (154) his conveyance again recorded as often as by subdivisions and changes the land may fall into a new or different county. Very prudent men may use such precautions. But it is not necessary for the protection of their rights, the first registry being amply sufficient."

McKissick v. *Colquhoun*, 18 Tex. 141.
Keys & Co. v. *First Nat. Bank*, 104 Pac. 346.
Hayden v. *Nutt*, 4 La. Ann. 65.
Chambers v. *Haney*, 45 La. Ann. 447, 12 So. 621.
Smith v. *Anderson*, 21 N. W. 841.
Hill v. *Saunders*, 4 Rich. Law, 521.
Broussard v. *Dull*, 21 S. W. 937.

That portion of the Duncan district in which this land is located was carved out of the Ryan, or 20th, District. The metes and bounds of the Ryan district as created being as follows (32 Stat. at Large 845, 10 Fed. Stat. Ann. 135):

"(District No. 20—Ryan). District numbered twenty. Beginning at a point on the western boundary line of the Indian Territory where the same intersects the base line; thence south along said western boundary line to the Red River; thence down said Red River to its intersection with the range line between ranges two and three west; thence north along said range line to the base line; thence west on said base line to the place of beginning. The

place of record for district numbered twenty shall be Ryan."

From this statute it will be seen that the land was located in the Ryan district, and we insist that it continued to constitute a part of the Ryan, or 20th, district, until the Duncan, or 29th, district, was legally organized upon July 7, 1906, and that Ryan was the proper place for plaintiff to record his deed at the time he recorded it.

At the time that defendants procured their deed it was incumbent upon them, before they could be innocent purchasers without notice, to examine the records of the Duncan recording district from the organization of that district and the records of the Ryan district up to the time of the organization of the Duncan district. *No day or hour should intervene between the two.* Is it a reasonable proposition that defendants could disregard the time intervening between June 21, 1906, and July 7, 1906, in their search of these records and still claim that they had discharged the obligation that the law imposed upon them? They should have at least presumed that there *was* a place at which instruments *could* be recorded during this time, instead of proceeding upon the theory that

for more than two weeks one of the most important functions of civil government was completely *paralyzed* and property rights denied the protection and benefits of the law in a large and populous district under the jurisdiction of the great United States.

Let us consider the results that would inevitably flow from the upholding of defendants' doctrine in this case. For a period of 16 days no land could be bought in this district without the purchaser placing himself at the mercy of the seller, and the purchaser's title could be defeated by any subsequent purchaser who had no actual notice of the prior sale. Mortgages would be absolutely valueless as to all persons not parties thereto, mortgaged property could be sold without violating the criminal laws, and all the benefits and safeguards of the laws relating to registration and recording of instruments of title would be denied to all persons owning or acquiring property within this district. Certainly no court would ever construe a law as to bring about this condition of affairs unless it was the plain and unmistakable intention of the legislating power so to do.

The law, no less than nature, abhors a vacuum.

It surely does no violence to the English language or to the established and recognized rules of construction, or to common sense, to construe the act of Congress creating the Duncan, or 29th Recording District, to mean that until the district was organized in accordance with existing law, the territory comprised in the new district would remain a part of the mother district. The law does not contemplate the performance of the impossible. The clerk of the United States court was never authorized or empowered to appoint a deputy clerk and establish an office at Duncan, Oklahoma, until the President signed the Act of June 22, 1906, yet defendants contend that at that time an office of the clerk of the United States court, fully equipped and ready to transact all business coming before such an officer, came instantaneously into being, although the act itself provided that certain steps should be taken in order to attain this result. The lower court, in effect, solemnly decided that it was the duty of the plaintiff to have his deed recorded by an officer and in an office that had no existence whatsoever at the time it was recorded, and that at a time when the plaintiff had an absolute right under the law to have it recorded. The fallacy of

this proposition is demonstrated by a mere statement of it.

The case of *Lumpkin* v. *Muncey*, 17 S. W. 732, *supra*, is a case that is directly in point and one that presents exactly the same issue. This is a Texas case and the facts, briefly stated, are as follows: The Legislature passed a bill which became a law of February 1, 1858, creating Runnels County and defining its boundary, out of territory theretofore embraced in Bexar County. On February 17, 1858, a deed to certain lands lying in said territory of Runnels County was executed and recorded in Bexar County, the mother county. The county government of Runnels County was not organized and there was no place to record instruments in said county until long after the date of the recording of said deed. The recording of this deed was later attacked and alleged to be void, but the Supreme Court of Texas, in the above case, and in other cases therein cited, holds the recording of the deed in the mother county to be good and lawful and to impart notice to all subsequent purchasers. In this case the court states:

"* * * This court had, in effect, held in

O'Shea v. *Twohig*, 9 Tex. 336 and *Clark* v. *Goss*, 12 Tex. 396, that acts of the Legislature which create new counties do not more than provide for their organization, and, until the new county is actually organized, the territory remains subject to the jurisdiction of the old county. In the first of these cases it was held that suit against parties residing in Kinney County, where the cause of action arose, could be brought in Bexar County, the former not having been organized at the time, though previously created out of the territory of Bexar. In the second, that, when the organization of a new county is provided for by law, the acts of the officers of the old county throughout the territory designated for the new county, done after the passage of the law, and before the actual organization of the new county, are valid. The case to which the principle was applied was that of a location and survey of land lying in the new county by officers of the old county. A similar ruling occurred in *Runge* v. *Wyatt*, 25 Tex. Supp. 292. The principle upon which these decisions rest is that any citizen of our state is entitled to all the benefits of civil government and the rights and privileges of the constitution and laws. But, if persons are to seek their rights and protect their property through the courts and officers of a newly created, they will be deprived of these benefits during the period intervening between the creation of the new county and its organization. This principle must govern the present case, no express laws inconsistent with it being found upon our statute books;

> otherwise, persons holding land in Runnels, County at the time its boundaries were defined by the Legislature and whose deeds had not been previously recorded, were deprived for a long period of time of all the benefits of the registration laws. Their titles were at the mercy of their vendors, and could be defeated by subsequent purchasers who had no actual notice of the deeds by which they were held. The effect of the decisions alluded to is to protect the parties having interest in the new county against any species of injustice and injury that might result from the act of its creation *ipso facto* severed its territory from the parent county. They clearly hold that, notwithstanding the passage of such an act, this territory remains, to all intents and purposes, part and parcel of the old county, until the new one is organized; or, it may be added, till the Legislature attaches it to some other county or district. Being still a part of Bexar County, notwithstanding the act of February 1, 1858, transfers of land lying where the land in controversy is situated were properly recorded in that county. If recorded in the proper county, there was no necessity to register again in Runnels County, or in any county to which it may have been thereafter attached for judicial purposes. * * ***

The similarity of the facts stated in this decision, as well as the relevancy of the reasoning supporting it, to the case at bar, is striking. As pointed out in the above quotation, the consequences arising from a decision that a portion of

this state was for a considerable period of time, without the benefits and protection afforded by our registration laws, would be serious and would result in grave injustice and hardship upon innocent citizens. We contend that when a law can be consistently construed to avoid this result, and when it is not shown in express terms to be the intention of the Legislature to bring about this condition of affairs that it is the duty of our courts to so construe the law so that all functions of our government shall operate continuously and without intermission, and to the end that there shall be no suspension of the operation of any law necessary to the protection of the property rights and welfare of any citizen.

Another case that is directly in point, decided by the Supreme Court of Texas, is *O'Shea v. Twohig*, 9 Texas Reports 170 (cited in the opinions already quoted in this brief), the opinion of which reads as follows:

> (Syllabus): "Acts of the Legislature which create new counties do no more than to provide for their organization; and until the new county is actually organized the territory remains subject to the jurisdiction of the old county; and the circumstances of the inclusion of the new county by name is another

judicial district, and in an act apportioning Senators and Representatives among the several counties of the state, do not affect the question (Note 55)."

(From the opinion):

"By an Act of the Legislature, to take effect from its passage, approved 28th of January, 1850, the County of Kinney was created out of the territory belonging to the jurisdiction of the County of Bexar. The act is silent upon the subject of organization; it only defines certain territorial boundaries which shall 'constitute the County of Kinney,' 'and that the town of Eagle Pass shall be the county seat.' By the act of January 29, 1850, the twelfth judicial district was created, and the County of Kinney was included therein. This act was to take effect from and after the 1st August, 1850; and by the Act of 8th February, 1850, the time of holding the District Court for the County of Kinney was fixed to be the first Mondays in March and September in each year. The only general act upon the subject of organization of new counties, where there is no mode pointed out by the act creating them, that we have found, is contained in the act of 16th March, 1848 (Art. 925). It is as follows: 'That, in all cases where a county is not organized and there is no officer in the same authorized by law to organize such county, the chief justice of the nearest county which is organized may order elections for county officers in any such disorganized county and appoint the presiding officers and managers and clerks of election, as prescribed by

law in other cases.' We have shown that ample provision has been made by legislation to organize the County of Kinney; that its territorial limits have been defined, and provision made for holding the district courts, but that its organization was left to the chief justice of the nearest county. Until this or-organization there could be no courts of any description. The district court could not be holden until, by the county organization, a sheriff and a clerk had been elected. What is the condition of the citizens embraced within the limits defined as the boundary of the new county during the time between the passage of the act creating the county (341) and its complete organization, as to their rights and remedies? and to what local jurisdiction are they amenable, on the one hand and on the other, to look for the enforcement of their rights? are grave questions, presenting some difficulty, as we said at the commencement of our discussion on this branch of the case. We believe, however, that a satisfactory conclusion can be obtained by fixing on the point of time when the jurisdiction of the mother county, Bexar, ceased, or will cease, to exist over the citizens of the territory designed to form a new county. Was it from the date of the passage of the act of the Legislature creating and defining the boundaries of Kinney County? We think not. If it ceased to exist at that time, it would be in the power of the Legislature to deprive a portion of the citizens, for a time, of all protection of the laws of the state and to let crime go unpunished and lawless violence wholly unrestrained. If it were true that during the time between the legisla-

tive act creating a new county and its organization, it would be beyond the jurisdiction of the old county, those who wished to avoid contributing to the support of the government by the payment of taxes and to obtain an immunity from the performance of the various public duties imposed upon the citizens, and, in fine, all those whose crimes had rendered them obnoxious to law, would combine and prevent an organization, and thereby defeat the administration of the law. The Legislature never believed or intended that such would be the result where the act creating the new county was passed; and by the expression used, that it should take effect from its passage, it did not mean that the jurisdiction of Bexar County should cease, it only meant that it should so far take effect as to authorize immediate measures for organization being taken and authorized the chief justice of the nearest county to proceed to complete the organization. Until that was completed, the jurisdiction of the mother county remained in full force. This is the result of necessity, and grows out of he principles of our Constitution, that guarantees to every citizen equal privileges. We believe, therefore (342), that the old jurisdiction remained in full force until the organization of the new one, and that the severance of the new county from the old was not completed until the organization of the new one. The jurisdiction of Bexar County continued unimpaired until the organization of Kinney County was completed."

We have not attempted to discuss herein

other evils that would flow if defendant's contention in this case were upheld, but many of them will readily suggest themselves to the court. It cannot be denied that the privilege of having an official record wherein instruments of title to land may be recorded and made notice to the whole world is one of the most important benefits of civil government. It, therefore, may well be said, as suggested by the Supreme Court of Texas in the case of *Clark* v. *Goss et al.*, 12 Texas Reports 198, that any act that would have the effect of suspending or destroying such rights and benefits of government as this, would be a nullity, and in violation of the spirit and letter of the Constitution which guarantees to every citizen equal privilege under the law.

In the case of *Clark* v. *Goss et al.*, 12 Texas Reports 396, above mentioned, the Supreme Court of Texas uses the following language:

> Syllabus: "Where the organization of a new county is provided for by law, the acts of the officers of the old county throughout the territory designated for the new county, done after the passage of the law, and before the actual organization of the new county, are valid; and, *prima facie*, it is presumed in favor of the acts of the officers of the old county

that the former organization continue until the new organization is proved.

(Opinion): "There is no question that the plaintiffs' location and survey were prior in point of time to the defendant's, and if valid must give them the superior and better title. But it is contended that the survey was invalid because made by a surveyor of Shelby County after the passage of the act establishing and providing for the organization of the new County of Harrison, which embraced within its limits that part of the old County of Shelby in which the land was situated. And in support of the objection we are referred by counsel for the appellant to the case of *Linn* v. *Scott* (3 Tex. R. 67). To this it is answered by counsel for the appellee that the new County of Harrison was not organized at the date of the plaintiffs' survey, and consequently that the territory remained within and subject to the jurisdiction of the County of Shelby. And the case of *O'Shea* v. *Twohig* (9 Tex. R. 336), is relied on as maintaining the authority of the surveyor of the latter county to make the survey in question.

"The proposition is undoubtedly true that a surveyor could not legally make a survey beyond the limits of the county or district in which he was appointed and empowered to exercise his employment or office. And this principle is maintained by the case of *Lynn* v. *Scott* (and see *Peacock* v. *Hammond*, 6 Tex. R. 544). But in that case the question in the present as to the authority or right of the officers of the old county to continue to exercise the functions of office over territory erected

into a new county within the limits of the old one, until the organization in fact of the new county did not arise and was not considered. That question arose and was first determined in the case cited by counsel for the appellee (*O'Shea* v. *Twohig*), which decides that, until the new county is actually organized, the territory remains subject to the jurisdiction of the old county, a principle the correctness of which, though the question were a new one, we could not hesitate to recognize. Otherwise we must admit the anomaly and absurdity of a community of persons within the state entitled to all the benefits conferred by civil government, and all the rights and privileges secured by the Constitution and laws, and yet, by law, deprived of these benefits and rights; neither amenable to the law nor enjoying its protection; disfranchised, and in effect expatriated. An Act intended to have such effect, or which required to be so construed as to give it such effect, would be a nullity. The case of *O'Shea* v. *Twohig* is decisive of the present question, and rightly so on principle. The officers of the County of Shelby were not precluded from exercising the functions of their offices, in all the extent of their former jurisdiction, until the new jurisdiction became operative by its complete organization.

"It does not appear when the County of Harrison was in fact organized. The county surveyor, it seems, was not qualified to enter upon the discharge of the duties of his office until (398) some months after this survey was made. He then respected the surveys of the same and even a later date than the present, made by the county surveyor of Shelby County, his prede-

> cessor in office, within the same jurisdictional limits. And it does not appear that the legality of those surveys was ever questioned, except in this instance; first by his successor in office (and now by those who claim under him), who, at the time, was seeking to appropriate to himself the land embraced within the survey. But for the disposition of the present question it will suffice to say that it devolved on the party impeaching the title to make good his objection; and if the survey was not in fact made until after the organization of Harrison County the defendant should have made proof of that fact. We conclude, therefore, that this objection to the plaintiff's title cannot be maintained."

We call the special attention of the court to the fact that the Act of the Legislature of Texas under discussion in this case provided that the Act "should take effect from its passage." As in the Act of Congress involved in this case, a new political subdivision was *created* out of an older and larger political subdivision, and its boundaries declared and established. In the one case the political subdivision was known as a "county" and in the other a "recording district" and each bore the same relation to its respective sovereign government. In each case the *organization* of the new political subdivision was to be carried out in accordance with laws already existing. This case of *O'Shea* v. *Twohig* is frequently cited and appears

to be the leading case in Texas upon this point. It would be idle for us to try to add anything to the reasoning or conclusions reached in this opinion, they are so patently supported by all the canons of justice, common sense and fundamental law.

See also to the same effect the following:

21 N. W. Rep. 841.
12 S. W. Rep. 229.
62 American Dec. 531, 18 Tex. 148.
55 American Dec. 696, 1 Court of App. 225 (Texas).
16 Century Digest (Deeds) 224.
13 Cyc. 598 (3).
21 S. W. Rep. 937 and 187.
69 Tex. 177, 7 S. W. Rep. 54.
41 Tex. 591.

In defendants' original brief, and also in the opinion of Commissioner Wilson the following cases are cited:

Astor v. *Wells*, 4 Wheaton 466, 4 Law. Ed. 616.
Green v. *Green*, 103 Cal. 108, 37 Pac. 188.
Garrison v. *Hayden*, 19 Am. Dec. 70.

By reading the statement of facts in the case of *Astor* v. *Wells et all*, *supra*, on page 617, it will be seen that the county of Tuscarawas was organized prior to the recording of that deed in the mother county. Therefore, this authority is not in point at all. In that opinion they use the word

"separation" instead of the word "creation" or "organization." The word "separation" in that opinion clearly means the date the Act went into effect upon the county being organized, and does not mean the day the Act passed the Ohio Legislature. "Separation" as used clearly implies and includes the two terms, "creation" and "organization." Likewise, the other authorities cited in the brief of defendants in error are not in point because they are cases where the new county was fully organized before the deed in question was recorded. The separation of the counties took place upon organization, prior to the recording of the deeds. Hence, they are not in point in this case.

The theory of laches advanced by defendants is too flimsy to require serious attention. This was an ejectment suit, a suit at law and not equity. The statute of limitation was fifteen years and plaintiff could bring his suit within that time. Defendants could not complain that plaintiff permitted them to enjoy the use of his land for two or three years without being molested.

For these reasons we insist that: (1) a rehearing be granted; (2) that the cause be reversed;

(3) that judgment be rendered in this court for the land and quieting title and for the sum of the agreed rents of $300.00 up to date of the judgment below.

C. S. ARNOLD and
JAMES E. WHITEHEAD,
Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of The United States

OCTOBER [redacted] TERM

1918

JAMES E. WHITEHEAD
Appellant.

vs.

NO. 496 184

JAMES O. GALLOWAY, WINFIELD S. PRESGROVE AND THE ATKINSON, WARREN AND HINLEY CO.
Appellees.

BRIEF OF APPELLEES.

H. A. LEDBETTER,
Attorney for Appellees.

IN THE
Supreme Court of The United States
OCTOBER 1917 TERM

JAMES E. WHITEHEAD
Appellant.

vs. No. 496

JAMES O. GALLOWAY, WINFIELD S. PRESGROVE AND THE ATKINSON, WARREN AND HINLEY CO.
Appellees.

BRIEF OF APPELLEES.

The statement of facts contained on pages 1 to 5 inclusive of the brief of the appellant is substantially correct, but the conclusion drawn from the facts by the appellant, we cannot agree with, and by reason of which we desire to make a statement and from our statement we will draw our conclusions.

The land in controversy is at this time situated in Carter County, Oklahoma, but before statehood and subsequent to June 21, 1906, it was the Twenty-Ninth Recording District, Indian Territory, and prior to June 21, 1906, it was in the Twentieth Recording District, Ryan, Indian Territory.

The appellant purchased the land June 27, 1906 and recorded his deed at Ryan the Twentieth Recording District. The Appellant did not take possession of the land and at no time did he ever place of record his deed either at Duncan, the Twenty-Ninth Recording District, or in Carter County, Oklahoma, and the first assertion of any right, title, claim or interest in or to said land by the appellant was on the 8th day of June, 1911, when this suit was filed.

James O. Galloway, one of the appellees, purchased the land on the 16th day of November, 1906, from Wilburn Adams (being the same person appellant purchased from), and immediately went into possession of the land, and Galloway subsequently sold the land to Presgrove, and Presgrove mortgaged the same to the Travelers Insurance Co., and also to Atkinson, Warren and Hinley Co., and the Travelers Insurance Co., assigned its mortgage to Atkinson, Warren and Hinley Co. On the 30th day of June, 1906, C. M. Campbell, Clerk of the United States Court within and for the Southern District of Indian Territory, appointed C. N. Jackson deputy clerk for the Twenty-ninth Recording District, Duncan, Indian Territory, and Jackson took his oath of office July 7, 1906.

The trial court at Ardmore entered its judgment for the appellees and an appeal was taken to the Supreme Court of Oklahoma and there affirmed. (R. 7).

From the foregoing statement of facts we feel that the opinion of the Supreme Court of Oklahoma was proper and should be affirmed by this court for the reasons as follows:

First: Congress having created the Duncan Recording District on the 21st day of June, 1906, even though the deputy clerk was not appointed until July 7, 1906, it was not the duty of the deputy clerk at the Ryan Recording Dis-

trict to transfer the instruments recorded subsequent to June 21, 1906, and it was not incumbent on the appellees to search the records of the Ryan Recording District when their purchase was made in November, 1907.

Second: That the appellent has been guilty of laches to such an extent that equity estops him from claiming title to the land as against the appellees.

Third: Counsel for appellant speaks of the opinion as "The Opinion of Commissioner Wilson", as if the opinion was not by the Supreme Court of Oklahoma. The legislature of Oklahoma created a Supreme Court Commission which was given authority to write opinions but such opinions were to be adopted by the Supreme Court proper. This opinion was adopted in whole as is shown at the bottom of the opinion. See page 13 of the record.

The deed of the appellant was executed June 27, 1906. (R. p. 33), which was six days after congress had created the Duncan Recording District (R. p. 31). We wish to call the Court's attention to this Act of Congress creating the Twenty-Ninth Recording District, which will be found in Volume 9, Fed. Stat., Annotated commencing on page 214. The latter portion of the section having particular reference to the creation of the Duncan Recording District. It will be noted that congress created the Recording District by metes and bounds. For reasons better known to congress, the judge of the United States Court for the Eastern District of the Indian Territory was given authority to create and establish by metes and bounds the Thirtieth Recording District, which was at Wilburton, but as to all other newly-created districts. including that of Duncan, congress saw fit to definitely locate by metes and

bounds the newly-created districts, and we can but come to the conclusion that all persons dealing in property affected by this change, including the appellant, would be bound by this law. In other words, when the appellant bought the land, congress had definitely created by metes and bounds the Duncan Recording District. Now, by the act of February 19, 1903, 32 Statute at Large 841, Vol. 10 Fed. Stat. Anno. 130, congress had extended Chapter 27 of Mansfield Digest of the Statute of Arkansas over the Indian Territory, and by section 671 of Mansfield Digest, it is provided that no deed or other instrument shall be valid as against a subsequent purchaser unless the same be recorded in the county (district) where the real estate is situated, unless the subsequent purchaser had notice of the prior deed.

By this Act of Congress (32 Stat. at Large 842), it is provided, that,

> "Such instruments *heretofore* recorded with the clerk of any United States Court in the Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, *and such records heretofore made* shall be of full force and effect, the same as if made under this statute."

It is contended by the appellant that it became the duty of the deputy clerk at the Ryan Recording District to transfer the record of his deed to the Duncan Recording District. At this time we wish to again call the Court's attention to the fact that the deed of the appellant was executed subsequent to the creation by metes and bounds, the

Duncan Recording District, and by reason of which it was not the duty of the clerk at the Ryan Recording District to transfer the deed to the Duncan Recording District. The language used is "*such instruments heretofore recorded*", meaning thereby, all instruments recorded prior to the creation by metes and bounds the Duncan Recording District. Again, we wish to call the Court's attention to the fact that the clerk at Ryan was not such a clerk as contemplated by the Act of Congress *supra*, with reference to the transfer of recorded instruments from one place to another, for, by the Act of Congress of March 1, 1895, 28 Stat. at Large 695, there was a clerk for the entire Southern District, which clerk was authorized to appoint a deputy at each place of holding court, and the clerk at Ryan was a *deputy clerk*, and by reason of which the Act of Congress *supra*, 32 Stat. at Large 842, did not apply for the language used is that such instruments heretofore recorded *with the clerk of any United States* Court in Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute. In our judgment, this act is clearly inapplicable to the case at bar. Counsel for appellant says that this court has passed directly on this question in the case of Keys and Co., vs. First National Bank, 229 U. S. 179 (57 Law. Ed. 1141), but we disagree with him, and say that the Supreme Court of the United States in the case of Astor vs. Wells et al, 4 Wheatio 616, has passed on the question and holds that where a new county is created out of an old county and a deed is executed after the creation of the new county, the recording of the deed in the old county is not effective

as against a subsequent purchaser. In re Astor vs Wells *supra*, at page 622, it is said:

> "The land was originally comprised within the limits of Jefferson County. But before the recording of the deed the County of Tuscarawas was taken off from Jefferson County. The law of Ohio required the recording of a deed in the county where the land is situated. The first question is, was this a legal recording under the laws of Ohio, so as to preserve the priority which Dates gave to Astor? The office of Jefferson County was the legal office at the time of executing the deed; did it continue to be so at the time of recording it? This can only be decided by considering the object of the law. It was to give notice to subsequent purchasers—to place at their command the means of investigation, to which, if they did not resort they had only to blame their own indolence or folly But no one in search of such information respecting lands situate in Tuscarawas County would be expected to search the records of Jefferson County subsequent to the date of the separation. He would naturally refer to the records of the county in which it was originally comprised."

The Duncan Recording District was separated from the Ryan Recording District June 21, 1906, by the Act of Congress of June 21, 1906, Vol. 9, Fed. Stat. Anno. 215, and was definitely fixed by metes and bounds, and subsequent to this time, all persons inspecting the records would naturally refer to the records since this date, and by reason of which, we say that the appellees purchased the land in question without notice, either actual or constructive, of

the existence of the deed of the appellant. See also the following cases: Williams vs. Logan, 32 Ga. 168; Barney vs. Little, 15 Iowa, 536; Richardson vs. Shelby, 3 Okla. 68; Adams vs. Hayden, 60 Texas, 226; Reed vs. Kemp, 16 Ill., 451, and Garrison vs. Hayden, 19 Am. Dec. 70.

One of the main cases relied upon by counsel for appellant is that of Trimble vs. Edwards, 19 S. W. 772, but the Court will note that in that case, the legislative act creating the new county provided that until the new county was organized the old county retained jurisdiction. The case of Trimble vs. Edwards, *supra*, and the other Texas cases cited by counsel for appellant, while good law, in our judgment, the facts in those cases are quite different from the facts here.

We admit for sake of argument, that if the deed of the appellant had been executed and recorded at Ryan prior to the creation of the Duncan Recording District by the Act of Congress of June 21, 1906, that the deed would not have to be re-recorded at Duncan. It would appear to us that the reasoning in the case of Astor vs. Wells *supra*, applies to the case at bar, for there it was said:

> "But no one in search of such information respecting lands situate in Tuscarawas County would be expected to search the records of Jefferson County subsequent to the date of the separation. He would naturally refer to the records of the new county at its origin, and from that time pursue his inquiries among the records of the county in which it was originally comprised."

Following this doctrine are the following cases:

Green vs. Green, 103 Cal. 108; Garrison vs. Haydon, I. J. J. Marsh (Ky.) 222, 19 Am. Dec. 70; Greer vs. Missouri Lumber, etc., 134 Mo. 85, 56 Am. St. Rep. 489; Alt vs. Fullerton, 151 Mo. 598; Stewart vs. McSweeney, 14 Wis. 468; Bell vs. Fry, 5 Dana (Ky.) 344.

The case of Keys and Co. vs. First National Bank, 229 U. S. 179, relied upon by the appellant, was a case where the mortgage was recorded prior to the creation of the new Recording District, while in the case at bar, the deed of the appellant was not even executed until six days after congress had definitely created by metes and bounds the Duncan Recording District, and by reason of which, we say, the Keys case is not in point.

In the case of Keys and Co. vs. First National Bank, supra, by the supreme court of the United States it is said.

> "*Purchasers were charged with notice of territorial limits*, and that Mays Ranch had been in the old northern district at a time the registration office was located at Muskogee, and that they must look to see whether, during that period, sales had been made or mortgages given on property then located within the district."

As said before, had the deed of the appellant been recorded prior to June 21, 1906, it would not be necessary to again record his deed, for it was made the duty of the clerk of the United States Court to transfer the same to the newly-created recording district, but the clerk was not required to search the record for deeds and mortgages recorded since congress had created the Duncan Recording District, and transfer the same to the newly-created re-

cording district. The Act of Congress of June 21, 1906, the appellant and all other persons were charged with, so the question presented by the record here, is the deed of the appellant having been executed subsequent to the creation of the Duncan Recording District by metes and bounds by the Act of Congress of June 21, 1906, was it the duty of the appellant to see that his deed was recorded in Duncan, or could he record his deed at the old recording district, Ryan, and do nothing more until the 8th of June, 1911, when he files his suit and says that he is entitled to the land as well as damages for withholding possession from him. During these five years the appellees, having a right to rely upon the records of the Duncan Recording District, have been dealing with this property as their own, and no claim of ownership has been made by the appellant. It would appear to us that the equities of this case are with the appellees, and we feel that the cases cited by us herein sustain our position on the law of the case.

Now it would appear to us that the appellant would be required to take notice of the creation of the Duncan Recording District, and there being nothing in the Act of Congress creating this new district, that required the deputy clerk at Ryan to transfer all instruments of record up to and including the time a new deputy was appointed for the Duncan District, it would appear to us that it was the duty of the appellant to either wait until there was an officer with whom he could record his deed or wait until such deputy was appointed and then record his deed. The appellant did neither; did not even go into possession of the land; did no act that would guard his rights but waited from June 26, 1906 until June 8, 1911, and then filed suit for the land. For five years he was permitting innocent

purchasers and mortgagees to deal with the land as though they were the owners thereof. It would seem to us that the great delay in bringing this suit seeking the cancellation of the deeds and mortgages should preclude the maintenance of this suit.

We therefore assert that under our second contention the appellant has been guilty of laches to such an extent that a court of equity should deny him the relief asked.

In re Elerdorf vs. Taylor, 10 Wheat 168, it is said:

"It has been a recognized doctrine of courts in equity, from the very beginning of their jurisdiction to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims."

In re Wagner vs. Baird, 7 How. (U. S.) 259, it is said, that:

"Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and can not be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor." See also the following cases:

Piatt vs Vattier, 9 Pet. 416. Maxwell vs. Kennedy, 8 How. 222; Badger vs. Badger, 2 Wall. 94, 2nd Story Eq. Jur., Sec. 1530; Underwood vs. Dugan, 139 U. S. 383; Hammond vs. Hopkin, 143 U. S. 250; Willard vs. Wood, 164 U. S. 524; Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S. 697; Cornell vs. Green, 43 Fed. 109; Kennedy vs. Cotner, 43 Fed. 710; Van Vleet

vs. Sledge, 45 Fed. 748;

There is nothing in the record to show why it was that the appellant permitted the appellees to deal with the land as though they were the legal owners, and it would seem to us that when they caused to be searched the records in the Duncan Recording District; caused abstracts to be made by the abstracter, and nothing was found affecting the title, the appellees did all that they were required to do, and when, coupled with the fact that the appellant waited for five years before laying claim to the land, that such laches on his part should, at least, be considered when determining the rights of the appellees who did all that any ordinary prudent person would have done.

Before closing we cannot help but call the special attention of the court to the very able opinion of our State Supreme Court as shown commencing on page 7 of record. It will be noted that the Supreme Court of Oklahoma was careful and pains-taking in writing it's opinion; it distinguishes the cases at bar from those cases like the ones cited by the appellant and from the opinion, we cannot help but feel that the Supreme Court of Oklahoma realized the well recognized doctrine in equity "that where a person has been negligent in his acts and deeds and by such acts and deeds he has caused another to be misled, that he cannot insist upon his legal rights against the rights of the other person who has acted in good faith."

The appellees were permitted to deal with the land in controversy in a matter which was recognized as their property for a period of five years; paying taxes on the land; collecting rents therefrom; mortgaging the same,

and otherwise using the same in every known way, and in all of which the appellant acquiesced.

Had the appellant used the precaution to have recorded his deed immediately after the deputy clerk was appointed at Duncan this long drawn out law suit would have been avoided. By the neglect of the appellant, can he ask a court of equity or a court of law to help him, we think not.

We respectfully submit that the opinion of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

H. A. LEDBETTER,
Attorney for Appellees.

WHITEHEAD *v.* GALLOWAY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 184. Submitted January 23, 1919.—Decided March 3, 1919.

Congress, having provided, through the Act of February 19, 1903, c. 707, 32 Stat. 841, and the provisions of Mansfield's Digest as thereby extended to the Indian Territory, that instruments affecting the title to land, to be valid against subsequent purchasers for value, should be recorded or filed in the office of the clerk or the deputy clerk of the United States Court for the Indian Territory, at the place of holding court in the recording district in which the land was located, afterwards, by the Act of June 21, 1906, c. 3504, 34 Stat. 343, created and defined a new recording district, naming a place for recording and for holding court therein, but an interval of some days occurred between the date of the act and the time when a deputy clerk was appointed and qualified for the new district and opened the office for reception of instruments. *Held*, that the law made no provision whereby during this interval a deed of land in the new district might be filed in an older district in which the land was previously located, and that a deed so filed was not constructive notice to subsequent purchasers who bought several months after the recording office in the new district was opened. P. 84.

The provision made by the Act of February 19, 1903, *supra*, for transfer of recorded instruments to the indices of new recording districts, applied only to instruments recorded before the date of the act. *Id.*

153 Pac. Rep. 1101, affirmed.

THE case is stated in the opinion.

Mr. C. S. Arnold for plaintiff in error, with whom *Mr. James E. Whitehead* was on the brief, insisted that Congress could not have intended the Act of June 21, 1906, to become immediately operative, before a deputy clerk and *ex officio* recorder could be legally appointed, could qualify, secure his quarters and records and open up his

office for the transaction of business. During such interval, the law as it previously existed remained in force, and with it plaintiff in error complied by filing in the older district. It was impossible to record at Duncan before the deputy clerk and *ex officio* recorder there had been appointed, because, under the laws, such deputy alone was qualified to act; and neither the clerk, marshal nor judge could do so. Act of February 19, 1903, 32 Stat. 841. Furthermore, there was provision for transfer of records. *Ib.* 842; *First National Bank* v. *Keys*, 229 U. S. 179. As to the peculiar functions of the deputy, counsel also cited Acts of May 2, 1890, 26 Stat. 81, §§ 30, 32, 38; March 1, 1895, 28 Stat. 693, §§ 3, 4.

Upon the right to record in the old district until the new is organized: *Lumpkin* v. *Muncey*, 66 Texas, 311; *O'Shea* v. *Twohig*, 9 Texas, 366; *Clark* v. *Goss*, 12 Texas, 395. Distinguishing: *Astor* v. *Wells*, 4 Wheat. 466; *Green* v. *Green*, 103 California, 108; *Garrison* v. *Haydon*, 1 Marsh. J. J. 222.

Mr. H. A. Ledbetter for defendants in error.

Mr. Justice Day delivered the opinion of the court.

This is a contest between claimants to the ownership of a tract of land now part of Carter County, Oklahoma, and prior to June 21, 1906, a part of the 20th Recording District, Ryan, (Office of the Recording District) Indian Territory. Thereafter it was in the 29th Recording District, Duncan (Office of the Recording District) Indian Territory.

The facts so far as pertinent are:

On the 27th day of June, 1906, Wilburn Adams, who held title to the land, made and delivered a deed for the same to the plaintiff in error, Whitehead, which deed was filed for record in the office of the 20th Recording Dis-

trict at Ryan, Indian Territory, on the 28th day of June, 1906, and was duly recorded. Afterwards Adams and wife made a warranty deed of the same property to James O. Galloway, dated November 16, 1906, and recorded November 22, 1906, in the office of the 29th Recording District of the Indian Territory at Duncan. Galloway on the 24th day of December, 1906, conveyed the same to Winfield S. Pressgrove and his wife, which deed was recorded at Duncan. Pressgrove and wife executed to the Travelers Insurance Company of Hartford, Connecticut, a mortgage on the land dated March 22, 1907, recorded April 5, 1907, in the office of the 29th Recording District at Duncan, Indian Territory. Pressgrove and wife executed a mortgage to the Atkinson, Warren & Henley Company, dated March 22, 1907, recorded April 24, 1907, in the office of the 29th Recording District at Duncan.

On June 21, 1906, Congress passed an act (34 Stat. 343):

"That in addition to the places now provided by law for holding courts in the southern judicial district of Indian Territory courts shall be held in the town of Duncan, and all laws regulating the holding of the courts in the Indian Territory shall be applicable to the said court hereby created in the said town of Duncan.

"That the territory next hereinafter described shall be known as recording district numbered twenty-nine, beginning at a point where township line between townships two and three north reaches the east boundary line of Oklahoma Territory; thence east on said township line twenty-four miles to where it intersects with range line three and four west; thence south on said range line twelve miles to where it intersects the base line between townships one north and one south; thence east along said base line six miles to the range line between ranges two and three west; thence south twelve miles along said range line to the township line between townships two

and three south; thence west thirty miles along said township line to where it intersects with the east line of Oklahoma Territory; thence north along said line twenty-four miles to the place of beginning; and the place of recording and holding court in said district shall be Duncan."

Prior to the passage of this act of Congress the lands involved in this case were located in the 20th Recording District of the Indian Territory, known as the "Ryan District." But this act made them a part of the 29th Recording District, known as the "Duncan Recording District." On June 30, 1906, C. M. Campbell, who was then Clerk of the United States Court for the Southern District of the Indian Territory, appointed C. N. Jackson deputy clerk and ex-officio recorder for the newly-created 29th Recording District, with headquarters at Duncan. C. N. Jackson took and subscribed the oath of office and filed his bond on June 30, 1906, and his appointment was duly approved by the United States Court at Ardmore on the same day. He arrived at Duncan and first opened his office on July 7, 1906, and the first entry made upon the books was upon that date. No recording office was opened at Duncan prior to July 7, 1906, when C. N. Jackson arrived and opened one.

From the time of the conveyance of the lands to Pressgrove (December 24, 1906) he has been in the actual possession thereof.

The lower court and the Supreme Court of Oklahoma decided in favor of Galloway and his successors, holding that the recording of the deed, made to Whitehead, at Ryan, was not constructive notice to the subsequent purchasers. (153 Pac. Rep. 1101; rehearing denied without opinion, 157 Pac. Rep. xxiii.)

At the time of the passage of the statute of June 21, 1906, another statute provided in effect (32 Stat. 841; 10 Fed. Stats., 1st ed., p. 130):

That chapter twenty-seven of the Digest of the Statutes

of Arkansas, of 1884, be extended to the Indian Territory so far as the same is applicable and not inconsistent with any law of Congress; that the clerk or deputy clerk of the United States Court of each of the courts of the Territory should be ex-officio recorder for his district and perform the duties required of the recorder in the chapter of Mansfield's Digest, hereinafter referred to. The duty was placed on each clerk or deputy clerk to record in the books provided for the office all deeds, mortgages, etc. Instruments theretofore recorded with the clerk of the United States Court for the Indian Territory, were not required to be again recorded, but should be transferred to the indexes without further cost, and that such records theretofore made should be of full force and effect. That whenever in said chapter (Mansfield's Digest) the word "county" occurs there should be substituted the word "district," and wherever the words "State" or "State of Arkansas" occur there should be substituted therefor the words "Indian Territory," and wherever the words "clerk" or "recorder" occur there should be substituted the words "clerk or deputy clerk of the United States court." The statute further provides that all instruments of writing, the filing of which is provided by law, should be recorded or filed in the office of the clerk or deputy clerk at the place of holding court in the recording district where said property may be located.

The provisions of Mansfield's Digest, which Congress extended to the Indian Territory so far as applicable, provide (Mansfield's Digest, 1884, c. 27, § 671):

"No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument, ob-

taining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and *ex officio* recorder of the county where such real estate may be situated."

Congress made no provision whereby deeds to lands in the new district were to be recorded at Ryan in the old district pending the opening of the office in the new district at Duncan. The provision as to transfer of recorded instruments to the new indexes, 32 Stat. 842, applied to instruments theretofore recorded. See *First National Bank* v. *Keys*, 229 U. S. 179.

Cases cited by plaintiff in error, where statutes provide for the organization of new counties, and holding that until such new counties are organized the place for recording is the old county where the lands are situated, are not apposite. Congress itself declared and defined the new Recording District, and the applicable provisions of Mansfield's Digest provided that no conveyance should be constructive notice against a subsequent purchaser unless such deed should be filed for record in the office of the clerk and *ex officio* recorder of the district where the real estate was situated. The statute is explicit, and when Whitehead bought from Adams the requirement of the law was plain that the deed should be filed for record at Duncan in the new district. See *Astor* v. *Wells*, 4 Wheat. 466. But, it is said, at the time of the conveyance to Whitehead, no office had been established at Duncan. This fact, however, did not continue Ryan as the place for recording deeds for lands in the new district.

The requirements of the legislation are positive, making Duncan the place for filing the deed in the new Recording District where the lands are situated. The plaintiff in error urges that until an office was opened at Duncan it was impossible to record a deed there. This

fact does present an anomalous situation, not to be remedied, however, by judicial construction in derogation of positive and controlling legislation.

Moreover, by the agreed statement of facts it appears that a deputy clerk, who became *ex officio* recorder, was appointed June 30, 1906, and opened his office for the transaction of business at Duncan on July 7, 1906. The conveyance from Adams to Galloway was made on November 16, 1906. Had Whitehead filed his deed for record at Duncan after the recording office was opened there and prior to November 16, 1906, Galloway and the subsequent purchasers would have had constructive notice by means of this record of the prior conveyance. But all that Whitehead did was to file his deed at Ryan after the land had become part of the Duncan district. After the opening of the Duncan office, it was his duty, if he would charge others with constructive notice, to file his deed in the office at Duncan. Had he done this he would have had a conveyance of record which would have been constructive notice to subsequent purchasers. Such constructive notice was not conveyed to Galloway and the subsequent purchasers by the filing of the deed for record at Ryan in the old district. It results that the judgment of the Supreme Court of Oklahoma must be

Affirmed.